Chicago Tribune Company *and* Chicago Web Printing Pressmen's Union No. 7, Graphic Communications International Union, AFL–CIO. Cases 13–CA–25535, 13–CA–25802, 13–CA–25906, 13–CA–25921, and 13–CA–26131

August 23, 1991

DECISION AND ORDER REMANDING PROCEEDING

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On December 12, 1989, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision, exceptions, and a supporting brief, and a brief answering the Respondent's exceptions. The Charging Party filed exceptions, a supporting brief, and a brief answering the Respondent's exceptions. The Respondent filed a response to the exceptions filed by the General Counsel and the Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and, for the reasons set forth below, has decided to reverse the judge's ruling striking the Respondent's three affirmative defenses. Furthermore, we find it necessary to remand this case to the judge for further proceedings including the reopening of the hearing, if necessary, and the issuance of a supplemental decision with findings and conclusions addressing the merits of the Respondent's affirmative defenses and articulating the basis for the judge's finding that striker replacements hired by the Respondent were permanent, rather than temporary.[2]

1. This case presents numerous unfair labor practice issues with respect to actions by the Respondent during the course of lengthy contract negotiations and an attendant strike. The amended consolidated complaint includes allegations that the Respondent: violated Section 8(a)(5) of the Act by insisting to impasse on November 13, 1985, over a permissive subject of bargaining, thereby converting a July 18, 1985 economic strike to an unfair labor practice strike; violated Section 8(a)(3) of the Act by refusing to reinstate unfair labor practice strikers upon receipt of an unconditional offer for all strikers to return to work on January 30, 1986; violated Section 8(a)(3) by failing to reinstate former economic strikers, who the Respondent claims were permanently replaced prior to November 13, 1985, when work was available after January 30, 1986; and violated Section 8(a)(5) by posting new conditions of employment on November 1, 1986, without having bargained to lawful impasse. The judge has found each of the alleged unfair labor practices.

In its answer to the complaint, the Respondent, inter alia, raised three affirmative defenses. In these defenses, it contends that, during the course of 59 bargaining sessions from February 1985 to November 1986, the Union unlawfully engaged in coordinated bargaining, unlawfully engaged in surface bargaining, and unlawfully insisted to impasse on the permissive subject of including supervisors in the bargaining unit. The Respondent contends that such conduct excused it from any statutory bargaining obligation and removed statutory protection from employees who struck or continued to strike in furtherance of the Union's alleged unlawful objectives.

Allegations in each of the affirmative defenses had previously been made in two 8(b)(3) unfair labor practice charges filed by the Respondent against the Union. The General Counsel dismissed one charge. The Respondent withdrew the other charge.

Prior to the hearing, the General Counsel moved to strike the Respondent's answer alleging that the Union was engaged in an illegal strike. Administrative Law Judge John M. Dyer denied the motion by order dated March 19, 1986. On October 2, 1987, the first day of the hearing, Administrative Law Judge Marion C. Ladwig orally denied parts of the Union's motion to quash subpoenas for information related to the affirmative defenses. Subsequently, however, Judge Ladwig reconsidered the matter. On January 13, 1988, he issued a written order granting the Union's motion to strike the affirmative defenses.[3]

In his order, the judge referred to *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984) (*Warwick Caterers I*).[4] In that case, the Board overruled its own precedent and adopted the reasoning of *Food & Commercial Workers Local 576*

[1] The General Counsel has filed motions to strike portions of the Respondent's brief in support of exceptions and the Respondent's response brief. After the Respondent filed a response to the motions to strike, the General Counsel filed a second supplemental motion to strike a portion of the Respondent's response. We agree with the General Counsel that certain portions of the Respondent's documents refer to evidence presented in a 10(j) proceeding or in another Board unfair labor practice proceeding, but not during the hearing in this case. Such evidence is outside the record. Accordingly, we grant the General Counsel's motion in part by striking the Respondent's references to extra-record evidence, and we shall disregard these references in our deliberations. *A.J.R. Coating Corp.*, 292 NLRB 148 fn. 1 (1988).

We deny requests by the General Counsel and the Charging Party to censure or impose other sanctions on the Respondent for allegedly frivolous and unethical litigation practices.

[2] We defer the Respondent's motion to reopen the record to the judge. In light of our decision to remand, we deny the Respondent's request for oral argument.

[3] The Respondent filed a request for special permission to appeal the judge's order to the Board. On March 24, 1988, a Board panel majority denied the Respondent's request in an unpublished telegraphic order, without addressing the merits of the judge's ruling. (Member Cracraft, dissenting, would have granted the appeal and reversed the judge's ruling.)

[4] See also *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987) (*Warwick Caterers II*).

(Earl Engle) v. NLRB, 675 F.2d 346 (D.C. Cir. 1982), with respect to the litigation of an affirmative defense raising contentions that had been raised in a prior unfair labor practice charge which the General Counsel had found to be without merit. In *Warwick Caterers*, the union's defense to an 8(b)(7)(C) complaint included allegations that the picketed employers were related to another employer which allegedly had a bargaining relationship with the union. The union had previously made these same allegations in 8(a)(5), (3), and (1) unfair labor practice charges which the General Counsel had dismissed. The Board agreed with the opinion of the court in *Earl Engle* that allowing the union to present its defense (1) did not constitute impermissible review of the General Counsel's decision not to issue complaint and (2) was necessary to afford the union its full right to an evidentiary hearing assured by Section 10(b).

The judge found that the holding of *Warwick Caterers I* only permitted litigation of an affirmative defense which had an allegation in common with a previously dismissed unfair labor charge when proof of that allegation would defeat one of the essential elements of the General Counsel's prima facie case. He further found that *Warwick Caterers I* did not permit express relitigation of a previously dismissed charge as an affirmative defense. In his view, the nonreviewable discretion to issue complaints vested in the General Counsel by Section 3(d) means that unfair labor practices cannot be alleged as affirmative defenses unless they have first been included in a timely charge which the General Counsel found to be meritorious. Based on this interpretation of controlling precedent, the judge concluded that the Respondent was not entitled to litigate its affirmative defenses in this case because (1) the Respondent ''would be improperly circumventing the statutory enforcement scheme'' if it were permitted to accuse the Union of unfair labor practices, and (2) the unfair labor practices alleged did not in any event present a valid legal defense to any necessary element of the General Counsel's prima facie case.

The judge's interpretation of *Warwick Caterers* is erroneous. Neither the Board in that case nor the D.C. Circuit in *Engle* made the distinction between an affirmative defense aimed at relitigating a previously dismissed unfair labor practice charge and an affirmative defense which merely had an allegation in common with a prior unfair labor practice charge. On the contrary, the essential holding of the court and the Board, as succinctly stated in *Warwick Caterers II*, supra at 939, is ''that a party is privileged to present, and the judge is bound to hear, receive, and consider its defense, notwithstanding the fact that the General Counsel had previously considered the same evidence in refusing to issue an unfair labor practice complaint.'' This due-process requirement does not interfere with the General Counsel's nonreviewable Section 3(d) complaint authority. Even if the Board's finding of merit in an affirmative defense entails a finding that an uncharged party has committed an unfair labor practice, the Board has no authority to issue an order directly against that party or to order the General Counsel to reconsider prior disposition of a unfair labor practice charge against that party. This rationale is equally applicable to situations in which the party alleging an unfair labor practice in an affirmative defense has not previously filed a charge or has withdrawn a charge prior to disposition by the General Counsel.

Consequently, *Warwick Caterers I and II* mandate litigation of the merits of the Respondent's affirmative defenses if, as a legal matter, proof of such defense could affect the judge's unfair labor practice findings. We conclude that the judge has also erred in finding that the affirmative defenses could not defeat essential elements of the General Counsel's prima facie case. Each of the Respondent's affirmative defense allegations, if proven, could warrant dismissal of one or more of the 8(a)(5) and (3) complaint allegations. With respect to the allegation that the Union engaged in surface bargaining, the Board stated long ago that ''a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.'' T*imes Publishing Co.*, 72 NLRB 676, 683 (1947).[5] With respect to allegations that the Union insisted to impasse on coordinated bargaining and the inclusion of supervisors in the bargaining unit, the Board has held that in certain circumstances a union's insistence to impasse on bargaining demands about permissive bargaining subjects suspends an employer's statutory bargaining obligation *and*, further, that a strike in support of such demands is not only unprotected but unlawful. *Nassau Insurance Co.*, 280 NLRB 878 fn. 3 and 891–892 (1986).

In light of the foregoing, we find it necessary to remand this case to the judge for further findings and conclusions with respect to each of the Respondent's affirmative defenses and the related 8(a)(5) and (3) unfair labor practice allegations. We note that the existing record, developed over 38 days of hearing, contains several thousand pages of testimony and hundreds of exhibits. In particular, there is considerable, detailed, testimonial, and documentary evidence about the parties' negotiations. In addition, there are offers of proof from the Respondent with respect to the affirmative defenses. We leave to the judge the determination of whether it is necessary to reopen the record in order to accord the Respondent its due-process right to litigate the affirmative defenses. Any additional evidence

[5] Also see *Roadhome Construction Corp.*, 170 NLRB 668, 672–673 (1968).

introduced into the record should be strictly limited to those defenses and to the evidence at issue in the Respondent's pending motion to reopen the record, which we have deferred to the judge. Every effort should be made to avoid unnecessary duplication of evidence already in the record.

2. In the event that the judge's resolution of issues related to the affirmative defenses does not affect his unfair labor practice findings, we find that the judge must also explicate the basis for stating that replacements hired for strikers were permanent, rather than temporary, prior to November 13, 1985. We agree with the General Counsel and the Union that this issue is closely related to the timely filed charge in Case 13–CA–25535 and has been fully litigated. In fact, the Respondent presented testimonial and documentary evidence which was relevant to this issue alone. It also argued the issue on the merits in its posthearing brief to the judge. Notwithstanding litigation of the issue, the judge assumed without explanation that replacements hired after the first month of the strike were permanent.

Contrary to the Respondent, we find that it must prove the contested fact of permanent replacement as part of its affirmative burden of proving substantial and legitimate justification for failing to hire former economic strikers upon receipt of their unconditional offer to return to work.[6] Furthermore, the Board has held that a showing of an employer's own intent to employ replacements permanently is insufficient. ''[R]ather, the employer must show a *mutual* understanding between itself and the replacements that they are permanent.'' *Hansen Bros.*, supra at 741.

In this case, it is undisputed that strike replacements were not hired on a permanent basis from the beginning of the strike until August 19, 1985. The Respondent contends that it thereafter decided to make all replacements permanent and that it communicated that decision in various ways to replacements. It is undisputed that there are no contemporaneous documents showing that the replacements had become permanent. The Respondent's primary witness in support of its permanent replacement claim was Pressroom Manager Richard Malone. The judge has already discredited other testimony by this witness, however, and observed that ''[b]y his demeanor on the stand he appeared willing to fabricate any testimony that might help the Company's cause.''[7] Other evidence includes testimony by employment specialist Kevin Dansart. He was one of at least two individuals responsible for screening replacement job applicants at the first step of the hiring process. Dansart testified that from mid-August through November 1985 he told applicants that they would be hired as permanent replacements. The judge has not expressly addressed either the credibility or sufficiency of Dansart's testimony. Finally, the Respondent has introduced documents prepared after January 1986 which denote the dates when employees allegedly assumed permanent replacement status. The judge has made no findings with respect to the probity of these documents, which were apparently prepared by an auditor who had no firsthand knowledge of the facts asserted.

In sum, absent definitive factual findings by the judge with respect to the above evidence, we have an insufficient basis for determining whether the Respondent has met its legal burden of proving that it hired permanent replacements for jobs vacated by those employees who struck on July 18, 1985. Accordingly, we find that a remand is necessary for the judge to make supplemental findings, including specific credibility determinations, and supplemental conclusions about the alleged permanent status of replacements.

ORDER

It is ordered that these proceedings are remanded to Administrative Law Judge Marion C. Ladwig for further proceedings in accord with the foregoing discussion.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Paul Bosanac, Esq., for the General Counsel.
R. Eddie Wayland and *James P. Thompson, Esqs.*, of Nashville, Tennessee, for the Respondent.
Sheldon M. Charone, Esq., of Chicago, Illinois, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Chicago, Illinois, on dates from October 2, 1987, to January 21, 1988, and from October 17, 1988, to January 19, 1989.

An economic strike began July 18, 1985, despite much compromising on major issues in nine off-the-record bargaining sessions. For the first month the Company, hoping the strike could be settled quickly, hired only temporary replacements. In mid-August 1985 it decided that the restaffing of the press department would be permanent.

[6] *Aqua-Chem, Inc.*, 288 NLRB 1108, 1110 fn. 6 (1988) (''We of course retain the Fleetwood rule that the initial burden is on the employer to show that the replacements in question were in fact permanent.''); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. 812 F.2d 1443 (D.C. Cir. 1987). See generally *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); and *Laidlaw Corp.*, 171 NLRB 1366 (1968).

[7] Infra at.

In negotiations on October 24, 1985,[1] the Company interpreted its proposed zipper clause to deprive the Union of contractual jurisdiction over a majority of the presswork. On November 13 it made a ''firm and final'' offer and demanded this application of the zipper clause to the Union's jurisdiction as a condition for signing an agreement. Although negotiations later resumed, the Company never withdrew this demand as a condition for reaching an agreement.

On January 30 the strikers offered to return to work. During the next 3 years the Company isolated the press department from the Union by refusing (a) to furnish the Union with the names and addresses of strike replacements and (b) to recall any of the strikers, even when understaffed.

The primary issues are whether the Company, the Respondent, unlawfully

(1) Bargained to impasse on changing the scope of the bargaining unit, a permissive subject of bargaining, converting the economic strike on November 13 into an unfair labor practice strike.

(2) Posted conditions of employment without a lawful impasse.

(3) Refused on January 30 to reinstate unfair labor practice strikers replaced after November 13.

(4) Refused to recall economic strikers to fill vacancies.

(5) Withheld names, addresses, and other information.

(6) Paid nonstrikers and returning strikers nonnegotiated wage rates.

(7) Discharged three strikers. Violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act are alleged.

Motions to Admit Evidence

The General Counsel on September 11, 1989 filed a motion (G.C. Exh. 1BBBB) and supporting brief (G.C. Exh. 1CCCC) and the Union on September 14 filed a motion and supporting memo (G.C. Exh. 1DDDD) to admit in evidence the testimony given by the former Crew Supervisor Diana Stanczyk on September 1, 1989, in a 10(j) proceeding.

The General Counsel asserts that Stanczyk's testimony directly contradicts the testimony given at the trial by Pressroom Manager William Unger and Vice President of Operations Gene Bell. He contends that contrary to their testimony indicating no shortage of pressmen, Stanczyk (who was terminated in March 1989) gave unchallenged testimony of (a) the pressroom being understaffed, (b) employee and supervisor complaints about overtime, (c) employees hiding from supervisors and seeking excuses from the nurse to avoid overtime, (d) an admonition by Production Manager Tom Steck to crew supervisors in supervisory meetings that ''There is no such thing as being short-staffed,'' and (e) stronger discipline for excessive absenteeism, etc.

The General Counsel asserts that this is newly discovered evidence and unknown at the time of trial because ''Discovery of this evidence was made impossible by [the Company's] requests not to contact replacement employees nor speak to employees in [the Company's] building.'' The Union urges that there is no need to reopen the trial to admit the testimony from other witnesses because the Company had an opportunity to cross-examine rebuttal witness Stanczyk or to call a witness to contradict her testimony. Its failure to do so ''is a strong indication that no such contradictory witness was available.'' On October 11, 1989, the Company filed a response (G.C. Exh. 1EEEE), stating that it opposes the motion unless other portions of the 10(j) record are admitted.

I find that it would be inappropriate for me to rely on this testimony in the absence of an opportunity to observe Stanczyk on the stand and to determine her credibility. Moreover, as in *Nvari Odette, Inc.*, 229 NLRB 137, 138–139 (1977), I find that the issues can be ''resolved on the record already made and upon the contentions of the parties.'' I therefore deny the motion to admit Stanczyk's testimony in evidence.

In its response the Company includes a motion (opposed by the General Counsel and the Union, G.C. Exhs. 1FFFF and 1GGGG) to admit voluminous portions (555 pages) of the record in the 10(j) proceeding, conducted months after the trial and filing of briefs. It asserts that much of the evidence ''goes beyond the existing record in this case'' and that these parts of the 10(j) record are ''independently relevant and probative of issues'' in this proceeding.

After considering all the arguments and circumstances, I find that it would not afford all the parties due process to go outside the record and rely on the belated evidence or on subsequent events in deciding any of the issues. I find instead that the issues should be decided on the basis of the evidence introduced during the 38 days of trial (from October 2, 1987, to January 19, 1989) without further delay. I therefore deny the motion. I also deny the Company's motion to admit ''relevant excerpts'' from the affidavit in the General Counsel's files of Joseph Outlaw, that he was told he was a permanent replacement. I find that the statement in the affidavit would not be of any value in deciding any of the issues.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, publishes a daily newspaper at its facilities in Chicago, Illinois, where it annually derives over $200,000 in gross revenues and subscribes to various interstate news services including the Associated Press. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Bargaining to Impasse on Permissive Subject*

1. Permissive subject of bargaining

a. *Scope of bargaining unit*

The expired 1979–1985 collective-bargaining agreement (G.C. Exh. 155) had defined the scope of the bargaining unit in both sections 1(a) and 1(b):

[1] All dates are from October 1985 to February 1986 unless otherwise stated.

[2] The Company's unopposed motion to correct the transcript, dated May 2, 1989, is granted and received in evidence as R. Exh. 78.

> Section 1. (a) The Employer recognizes the Union as the exclusive collective bargaining agent for the employees engaged in the operation of the Dresses. . . . The pressroom department shall be interpreted to mean the entire pressroom . . . made up of union employees and in which the Union has been formally recognized by the Employer. . . .
>
> (b) It is mutually agreed that the above is defined to mean all work currently recognized between the parties as embracing the operation of all Printing Dresses . . . and shall be interpreted to include [listed make-ready items 1–6]. [Emphasis added.]

The next paragraph in section 1(b) provided that ''It is . . . agreed that . . . the above work (Items No. 1 to 6 inclusive) may be performed by machinists as part of a repair or overhaul.''

Thus the scope of the bargaining unit was defined in the section 1(a) recognition clause in terms of work assignment, ''employees engaged in the operation of the Dresses [emphasis added].'' Section 1(b), which set out the union jurisdiction, further defined this work assignment ''to mean all work currently recognized . . . as embracing the operation of all printing presses emphasis added] . . . and shall be interpreted to include [items 1–6].''

The evidence is undisputed that the words ''and shall be interpreted to include [items 1–6]'' had been added in 1960 to include make-ready work involved in a jurisdictional dispute between the Union and the Machinists (Tr. 822 12/2/87, 1386 12/5/88). These make-ready items include such work as ''Changing and adjusting folder cutting knives'' (but not ''after they have been taken out of the press''), ''changing oil filters and greasing press cylinders,'' changing and adjusting angle bars, slitters, and trolleys, and ''Changing folders from straight to collect.''

From February 1985 (when negotiations began) until October 24 the scope of the bargaining unit and union jurisdiction had not been a major issue. The principal dispute had been whether the plate-making operations, also performed in the press department, should be added to section 1(b). At the July 26, 1985, meeting the Company incorporated plate-making in its proposed section 1(b) as item 7 (G.C. Exh. 48 p. 4).

The Company's October 4 proposed agreement (G.C. Exh. 66A) contained the above-quoted unit-jurisdiction language in sections 1(a) and 1(b) from the 1979–1985 agreement, except that the words ''the above is defined'' in section 1(b) was amended to read ''the above Section l.(a) is defined'' and the plate-making item 7 was included. Section 1 of the proposal also included the Company's proposed zipper clause, which read in part:

> This contract *supersedes* and replaces any and all agreements . . . practices . . . *understandings* . . . governing the relationship between the Employer and the Union, whether written, oral or implied. [Emphasis added.]

b. *The October 24 ''bombshell''*

At the October 24 meeting, when the Union was tentatively agreeing to sections 1(a) and 1(b) of the Company's October 4 proposed agreement, Company Vice President and chief spokesman George Veon stated he wanted to make sure that everyone knew what was being agreed to. He then interpreted the impact of the zipper clause, stating that the only work jurisdiction covered by section 1(b) was the work specifically spelled out: ''[I]t says what it says'' (Tr. 1142–1143 12/1/88). ''The things that are certain are those things listed in 1 through 7'' (Tr. 1727 12/6/88). He was referring to the make-ready items 1–6, plus the plate-making item 7—not to the majority of the presswork, including the part of the reel room work performed in operating the presses.

Before this ''bombshell,'' as the Union points out in its brief (at 2–3), the Union was unaware that the Company intended to apply the zipper clause in this manner.

Union President Robert Hagstrom told Veon that section 1(b) says ''operation of all printing presses'' and includes the reel room. Hagstrom explained that items 1–6, covering make-ready work, were added to avoid jurisdictional disputes. (Tr. 3837–3838 1/18/89.) (Although make-ready items 1–6 were added in 1960 to settle a dispute with the Machinists, many of them are also performed as required during the operation of the presses, Tr. 853–854, 857 12/2/87; 983–988 12/3/87; 2858 12/15/88.)

Labor Relations Manager William Howe, reading from his notes of the meeting, testified that when International Vice President Guy de Vito asked for Veon's interpretation of section 1(b), Veon answered: ''All that it says specifically is what it means.'' Hagstrom asked, ''Then past practice means nothing,'' and Veon answered, ''That's right.'' Veon stated that ''We would risk arbitration on those items not listed.'' (Tr. 3836–3839 1/18/89.) Howe's notes further show that the union attorney responded, ''We'd have no arbitration'' (meaning no case to arbitrate without past practice). (G.C. Exh. 176 p. 25 of Howe's 10/24 notes.) The Company admits in its brief (at 35): ''The Union's position was that in light of the Company's proposed zipper clause there would be nothing to arbitrate.''

De Vito said that the people knew what ''operation of the presses'' meant and suggested that Pressroom Manager Richard Malone list the pressmen's job functions so the Union could make a counterproposal (Tr. 1726–1727 12/6/88, 3845 1/18/89). De Vito, as International vice president, declared: ''*We are not going to have [an] open-ended contract* [emphasis added] based on . . . your interpretation and your zipper clause'' (Tr. 717 11/6/87; G.C. Exh. 176 p. 27 of Howe's 10/24 notes). Veon responded that ''We are comfortable with our proposal'' (Tr. 1444 12/5/88, 1728 12/6/88) and the negotiations proceeded on other issues.

In the absence of Veon as a defense witness, Company Attorney James Rules (a management bargaining committee member, Tr. 1283 12/2/88, 1409 12/5/88, who also took bargaining notes) gave the following testimony. He conceded that under the Company's proposal the pressmen's reel room work was not the Union's ''exclusive contractual jurisdiction'' and, if the Company chose, it could assign that work to members of the Mailers union (Tr. 1283, 1348 12/2/88). (The Mailers already represented certain reel room employees, Tr. 1411 12/5/88.) Kulas later conceded that under the Company's proposal, if the Company made a major assignment of pressroom work to a mailer or machinist, for example, the Union ''would not represent that person'' (Tr. 1422–1424 12/5/88).

c. *Deadlock at November 13 meeting*

At the next meeting on November 5, after responding to the Company's last proposals, the Union proposed an amended section 1(b) to include a list of the pressroom and reel room assignments (G.C. Exh. 71; Tr. 855–856 12/2/87, 1168 and 1175 12/1/88, 2166 12/8/88). Veon never denied that the pressmen performed this listed work (Tr. 1555 12/5/88). His own notes of the meeting (G.C. Exh. 165 p. 167; Tr. 661 11/6/87) confirm that he took the position that the Company's section 1(b) proposal was limited by the zipper clause to items 1–7. The notes show that Veon, responding to De Vito, stated: ''Contract means what it says. *Past practices or understandings don't apply*, contract language applies'' (emphasis added).

The next meeting was on November 13, when Veon presented the Company's ''firm and final'' offer (Tr. 1195 12/1/88; G.C. Exh. 73). It retained the Company's same zipper clause and unit-jurisdiction proposals. Rejecting the Union's November 5 proposal (which listed the pressmen's assignments), Veon stated (as Kulas testified from his notes): ''Our interpretation is exactly what we told you it was at the last meeting. The language is what it says, and a large amount of presswork is not covered in that section.'' Veon added that ''the most gleaming example is the reel room.'' (Tr. 1184 12/1/88.)

International Vice President De Vito told Veon that ''The word 'embracing' [in the section 1(b) phrase ''embracing the operation of all printing presses''] includes all things we discussed and proposed [on November 5], including reel room work.'' As Kulas further testified from his notes, Veon responded: ''What I am saying is exactly what the contract says. That is the work, the jurisdiction. I am not concerned with what our proposal doesn't say, only concerned with what it does say.'' When asked by the union counsel, ''Would we do what is listed in our [proposed section] 1(b) if we went back tomorrow?'' Veon answered that the Union ''*Couldn't claim it under the language we proposed* [emphasis added].'' (Tr. 1188–1189 12/1/88.)

Veon, as a condition for signing an agreement, was adamantly demanding this application of the zipper clause in interpreting section 1(b) of the Company's November 13 ''firm and final'' offer. The Union made it clear ''they couldn't agree'' because of that interpretation (Tr. 1186 12/1/88).

Veon's bargaining notes, which show the discussion of section 1(b) comprised much of the morning and afternoon sessions (G.C. Exh. 165 pp. 172–174), indicate that the meeting concluded soon after Veon suggested that an impasse bad been reached:

> We have considered your proposals, you have considered our proposals. Seems like we are now starting to engage in fruitless bargaining that will lead nowhere. [Emphasis added.]

d. *Contentions of the parties*

The General Counsel contends in his brief (at 17) that ''this case rests on [the Company's] interpretation of section 1(b), not on any change in the specific language contained in any of its proposals for section 1(b).'' He then argues (footnote omitted):

> Under [the Company's] interpretation of its November 13 firm and final offer—based on its zipper and management rights clauses—the Union's contractual jurisdiction was limited exclusively to items 1 through 6. All other work in the pressroom would be assigned to members of the Union at [the Company's] discretion, thereby allowing [the Company] to reassign presswork—other than items 1 through 6—to employees in other bargaining units, whom this Union could not legally represent. Inasmuch as [the Company] recognizes the Union as the representative ''for all the employees engaged in the operation of the presses,'' its proposal unlawfully changed the scope of the unit by allowing [the Company] to alter the composition of the unit at will, merely by reassigning pressroom work to nonbargaining unit employees.

Although both sections 1(a) and 1(b) in the Company's proposed agreement define the scope of the bargaining unit in terms of work assignment, the Company argues in its brief (at 22–23):

> Section 1(a) of the contract is a unit description and describes the people that are in the unit represented by the Union. . . . Section 1(b) is the jurisdictional section, outlining the work assignments the Union had the exclusive contractual jurisdiction to perform.

The Company contends (at 56) that contract proposals regarding work assignment are mandatory subjects of bargaining, citing *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975). In that case the court held that ''unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit'' if the employer bargains in good faith and the employer is not motivated by union animus.

The Company further contends (at 60) that cases in which ''the courts and the Board have held it unlawful for an employer to bargain to impasse over changes in the wording of recognition or jurisdictional clauses are clearly distinguishable.'' It concludes (at 62): ''The most significant difference between this case and all the other recognition/jurisdiction cases is that in this case, the Company was not even attempting to change jurisdiction, much less the unit description.'' In explanation the Company adds (at 63):

> The difference in the parties' proposals was that the Company proposed a zipper clause while the Union did not. . . . It simply cannot be the law that a company is prohibited from proposing a zipper clause when the contract contains a unit description. Certainly, no case has ever so held.

e. *Concluding findings on permissive subject*

(1) Assignments at Company's discretion

For many years the scope of the bargaining unit had been defined in section 1(a) as ''the employees engaged in the operation of the presses.'' It was further defined in section 1(b), which stated that ''the above is defined to mean all work currently recognized . . . as embracing the operation of all printing presses . . . and shall be interpreted to include [the

make-ready items 1–6].'' It is undisputed that those make-ready items were a minority of the pressmen's assignments.

On November 13, when making the Company's ''firm and final'' offer, Veon applied the zipper clause and adamantly insisted that the Union ''Couldn't claim . . . under the language we proposed'' the principal part of the pressmen's traditional duties, operating the presses. As Veon had explained, ''Past practices or understandings don't apply,'' only the ''contract language applies,'' and items 1–6 are the only duties listed in section 1(b).

Veon was demanding, as a condition for signing an agreement, that the Union accept an interpretation of the proposed zipper clause and section 1(b) that would deprive the Union of contractual jurisdiction over most of the pressmen's traditional work. If the ''firm and final'' offer were accepted, the Company would have the right to assign the reel room work and other presswork not listed in items 1–6 to nonbargaining unit employees.

Veon had stated, ''We would risk arbitration on [the assignment of] those items not listed'' in section 1(b). But, in light of the zipper clause, he also told the Union that past practices would mean nothing in an arbitration to interpret the words ''embracing the operation of all printing presses.'' (Tr. 3838–3839 1/18/89.) The Union pointed out that without past practices, there would be nothing to arbitrate. I agree with the General Counsel, as contended in his brief (at 25), that this ''precluded the Union from relying on past practice to establish the previous assignment of work.''

(2) Applicable precedents

I find that the 10th Circuit decision in *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981), enfg. 232 NLRB 291 (1977), refutes the Company's contentions. There the jurisdiction of the union and the bargaining unit were defined to include only employees engaged in work assigned in the composing room. The court held (625 F.2d at 962–963, footnote omitted):

> The [employer] says that bargaining units are composed of people, not work, and argues that the Board's exclusive authority to determine the appropriate unit under 9(b) should not be construed as precluding management from seeking the contractual right to transfer work out of the unit as its economic needs dictate, as this is a mandatory subject within 8(d) of the Act. . . .
>
> We cannot find support in the cases for [the employer's] conduct in insisting to impasse on altering the existing contractual unit description. Insistence on a modification in the scope of the bargaining unit . . . is an unfair labor practice in violation of 8(a)(5) of the Act.''

The court, citing the *University of Chicago* case, also held (625 F.2d at 964): ''It is true, as [the employer] contends, that the transfer of work out of the bargaining unit is a mandatory subject of collective bargaining.'' The court found, however, that ''in demanding the right to transfer work out of the unit at will, [the employer] sought to circumvent the Union's right to represent the employees in the composing room unit.'' The court then added (625 F.2d at 964):

> To allow an employer to alter the composition of the unit at will by unilaterally electing to transfer work out of the unit would effectively deprive unit employees of their statutory right to collective representation and bargaining as to the reduction or elimination of their jobs through work transfers. . . . The employer's unilateral action would place those jobs beyond the scope of the unit represented by the Union.

The court (625 F.2d at 964–965) next cited the Fourth Circuit's rejection of a virtually identical argument in *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77–78 (4th Cir. 1979), quoting from that decision in part as following:

> The Board agrees that, unless transfers are specifically prohibited by the relevant collective bargaining agreement, an employer may transfer work out of the bargaining unit, as long as the employer first bargains in good faith and is not motivated by anti-union animus [citing the *University of Chicago* case]. It does not follow however, that an employer, under the guise of transfer of unit work, may alter the composition of the bargaining unit. To do so would not only modify the job functions of the various unit members but also affect their right to representation. Thus, implicit in the requirement that the employer bargain in good faith before changing unit work is the assumption that the affected members of the unit will be represented.

Ignoring these rulings in the 10th Circuit's *Newspaper Printing* decision, the Company in its brief (at 60) attempts to distinguish the enforced Board decision, *Newspaper Printing Corp.*, 232 NLRB 291 (1977). It argues that there, ''Because the clause not only *allowed the employer to determine the work to be assigned* to employees in the unit, but went on to *define the bargaining unit in terms of work assigned*, it was held to be a permissive subject of bargaining'' (emphasis added). I find, however, that the Board's decision in that case cannot be distinguished on either ground.

In that case the Board held (232 NLRB at 291–292) that under the proposed jurisdiction-unit clause, the employer ''retains unfettered discretion to redefine the unit at any time.'' (The clause read: ''The jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including only those employees engaged in all work which the Employer may from time to time designate to be performed in the Composing Room.'')

Similarly here, by applying its zipper clause to section 1(b), the Company was proposing that the Union's claim to the presswork was limited to the specified make-ready items, leaving the assignment of a majority of the presswork to the Company's discretion.

Furthermore, as found above, the scope of the bargaining unit was defined in both sections 1(a) and 1(b) in terms of work assignment, operating the presses. The phrase ''employees engaged in the *operation of the presses* [emphasis added]'' in section 1(a) was further defined in section 1(b) to mean ''all work currently recognized as embracing the *operation of all printing presses* [emphasis added],'' etc. Therefore, changing the interpretation of the section 1(b) definition of the work assignment automatically changes the unit definition in section 1(a).

Moreover, even if the scope of the bargaining unit in section 1(a) had not been defined in terms of work assignment and had not been further defined in section 1(b), the reason-

ing in the 10th Circuit decision would still apply. The court found, as quoted above (625 F.2d at 964), that

> in demanding the right to transfer work out of the unit at will, [the employer] sought to circumvent the Union's right to represent the employees in the composing room unit.
>
> . . . To allow an employer to alter the composition of the unit at will by unilaterally electing to transfer work out of the unit would effectively deprive unit employees of their statutory right to collective representation and bargaining as to the reduction or elimination of their jobs through work transfers. . . . The employer's unilateral action would place those jobs beyond the scope of the unit represented by the Union.

In a later case involving the same employer, *Newspaper Printing Corp. v. NLRB*, 692 F.2d 615 (6th Cir. 1982), the Sixth Circuit found that the employer had corrected the ''fatal defect'' found by the 10th Circuit in the employer's impasse proposal. The employer had changed its earlier proposal, insisting on the right to change unilaterally the scope of the bargaining unit, to include a provision that ''composing room work shall include . . . all other composing room employees.'' Here, to the contrary, the Company insisted on applying its proposed zipper clause, leaving to its discretion the assignment of a majority of the presswork to nonbargaining unit employees.

In this second *Newspaper Printing* case the Sixth Circuit, 692 F.2d at 621, denying enforcement of 250 NLRB 1144 (1980), held that although the words ''all composing room work'' in the work jurisdiction and unit description in the previous agreement were changed in the impasse proposal to ''all work performed in the composing room,'' those two phrases described the same tasks. ''[W]e find no evidence that any employees within the previously agreed upon appropriate bargaining unit would not be represented by the [union] under the impasse proposal.'' Here, to the contrary, the Company was insisting on language that would permit it to make unilateral assignments to employees in other bargaining units.

In *Standard Register Co.*, 288 NLRB 1409 (1988), the Board more recently held that a work jurisdiction proposal (''The jurisdiction of the [union] is defined as the work assigned'' by the employer to certain departments) was a ''unit description and not work jurisdiction alone.'' (The separate recognition clause provided that the employer recognized the union ''as the exclusive bargaining representative of all [journeyman and apprentice] employees covered by this Agreement.'') The Board held that ''The jurisdiction-unit clause . . . would give the [employer] unfettered discretion to redefine the unit at any time by changing the assignment of work.'' It concluded (id. at 1411) that the employer unlawfully ''insisted to impasse on a contract proposal altering the established unit description, a nonmandatory subject of bargaining.''

(3) Conclusions

As the General Counsel points out, an employer may not bargain to impasse over changes in the unit description because the scope of the bargaining unit is a permissive subject of bargaining. *Newspaper Printing Corp. v. NLRB*, above, 692 F.2d 615, 620 (6th Cir. 1980).

The Company applied the proposed zipper clause in its November 13 ''firm and final'' offer to limit the Union's contractual presswork jurisdiction to the make-ready items 1–6. Under this interpretation, the Company could assign reel room and other presswork at its discretion. This interpretation of the zipper clause had the effect of changing the scope of the bargaining unit from ''employees engaged in the operation of the presses'' to ''employees engaged in performing make-ready pressroom work and other pressroom work assigned to pressmen.''

I agree with the General Counsel that the Company was proposing to change the scope of the bargaining unit by permitting the Company to alter the composition of the unit at will, merely by reassigning pressroom work to nonbargaining unit employees.

I therefore conclude that this application of the zipper clause, changing the scope of the bargaining unit, was a permissive subject of bargaining.

2. Impasse on permissive subject

The complaint in Case 13–CA–25535 alleges that on November 13, 1985, the Company bargained to impasse in support of its demand, ''as a condition of consummating any collective-bargaining agreement, that the Union agree to an interpretation of a provision that would change the description of the Unit,'' a nonmandatory subject of bargaining.

As acknowledged in the Company's brief (at 46), this allegation is ''a narrowly focused claim that the Company impermissibly insisted to impasse upon a permissive subject of bargaining.''

I note that there is no allegation that the Company and Union had reached an impasse on mandatory subjects of bargaining. Compare *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (impasse in negotiations after good-faith bargaining on mandatory subjects); *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987) (no impasse in bargaining on mandatory subjects if ''both parties are still negotiating'').

Apart from the issue of whether the impasse prolonged the economic strike, converting it into an unfair labor practice strike as discussed later, I find the evidence clear that at the November 13 negotiating meeting the Company bargained to impasse on a permissive subject of bargaining.

Spokesman Veon was adamant in his demand (a) that the Company's proposed zipper clause and section 1(b) be interpreted to limit the Union's contractual pressroom jurisdiction to six make-ready items, (b) that the Company would have the discretion to assign other presswork to nonbargaining unit employees, and (c) that under the Company's zipper clause–section 1(b) interpretation, ''Past practices or understandings don't apply'' and the Union could not claim its traditional duties of operating the presses as bargaining unit work.

Since October 24, when International Vice President De Vito declared that ''We are not going to have [an] open-ended contract based on . . . your interpretation and your zipper clause,'' the Union had made it clear that this application of the zipper clause was wholly unacceptable. Yet Veon announced that his November 13 offer, which included the zipper clause–section 1(b) demand, was firm and final. He

adamantly insisted on this demand as a condition for signing an agreement and claimed an impasse.

As held in *Newspaper Printing Corp. v. NLRB*, above, 692 F.2d 615, 620 (6th Cir. 1982):

> By mutual consent, the parties may bargain . . . concerning the scope of the bargaining unit, a permissive subject of bargaining [citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)]. Because such bargaining is permissive only, however, it is a violation of section 8(a)(5) of the Act for one party or the other to bargain to impasse . . . on such a subject.''

In *Borg-Warner*, 356 U.S. at 346–347, which involved ''ballot'' and ''recognition'' clauses that were not mandatory subjects of bargaining, the Supreme Court held:

> From the time that the company first proposed these clauses, the employees' representatives . . . made it clear that each was wholly unacceptable. The company's representative made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses. In view of this impasse, there was little further discussion of the clauses, although the parties continued to bargain as to other matters. . . . Finally [the union] gave in and entered into an agreement containing both controversial clauses.

Similarly here, the Union made it clear, from the time the Company first made the demand, that the Company's zipper clause–section 1(b) interpretation was wholly unacceptable. The Company made it equally clear that its demand was a condition for signing an agreement. I therefore find that on November 13 there was an impasse on this permissive subject, even though (as discussed below) the Union later resumed its futile efforts to persuade the Company to drop its demand and the parties resumed bargaining on mandatory subjects.

Accordingly I find, as alleged in the amended complaint (G.C. Exhs. 1CCC) in Case 13–CA–25535, that on November 13 the Company refused to bargain in good faith by bargaining to impasse on its demand, as a condition for consummating an agreement, that the scope of the bargaining unit be changed, violating Section 8(a)(5) and (1) of the Act.

B. *Conversion of Strike*

1. Status of the bargaining

The 1979–1985 agreement (G.C. Exh. 155), expiring April 3, 1985, was between the Union and the Chicago Newspaper Publishers' Association, an association composed of the Company and the Chicago Sun-Times. In October 1982 the Company completed the move of its pressroom from the Tribune Tower on Michigan Avenue to the ''Freedom Center,'' a new production facility on Chicago Avenue. The new facility had state-of-the-art offset presses, replacing the old letterpress equipment. (Tr. 1733–1735 12/6/88; G.C. Exhs. 156–158.)

At the request of the Union, the Company and Union began separate bargaining on February 8, 1985. From the beginning, the Company placed a high priority on assuming control over employment, ending its obligation to obtain its part-time employees through the Union's call room. It was convinced that for efficiency and lower production costs, it must stabilize its work force with employees adequately trained on its offset presses. It also insisted on removing working foremen (''men-in-charge'') from the bargaining unit, yet permitting them to continue doing unit work. (Tr. 1771 1/14/88, 2317–2318 12/13/88; G.C. Exh. 93.) The Union opposed both changes.

Both the Company and Union engaged in hard bargaining and little progress was made in resolving these and other major differences. On May 9, 1985, the Union listed 26 unresolved issues separating the parties (R. Exh. 32). Company spokesman Veon, however, ''said that if the Union would drop the Call Room proposal . . . we probably could wrap things up'' (Tr. 1873–1874 1/15/88).

Finally on June 20, 1985, after Vice President of Operations Gene Bell had entered the negotiations, both parties began demonstrating a sincere desire to compromise and avoid a strike. In nine off-the-record discussions (some of them quite long, lasting into the night or early morning hours), they sought solutions to the call room and other major issues, discussing a proposed agreement to amend the 1979 agreement and extend it 2 years. (G.C. Exh. 176.)

The Company's July 10, 1985, draft of the proposed off-the-record ''Agreement to Extend and Amend'' (a six-page document) shows how the parties were seeking to compromise (G.C. Exh. 189). To resolve the call room issue, for example, they discussed having the Company reserve to itself all decisions in employing and training employees, and having it hire and ''sub-line'' (work as substitutes) 50 journeymen currently working out of the call room (Tr. 1739–1740 1/14/88). They discussed excluding all statutory supervisors from the bargaining unit and permitting them to perform ''customary supervisory duties.''

The effort failed, however, when the parties could not agree on all the provisions as a package (Tr. 1932, 1939, 1952 1/15/88; 2437, 2539–2540 1/20/88; 2606 1/21/88). The parties then returned to their on-the-record positions, which were far apart.

Some progress in negotiations was made during the first month of the strike when, as the Company states in its brief (at 3), it was using temporary replacements, ''hoping the strike could be settled quickly.'' But little if any progress was made after the middle of August, when the Company began permanently replacing the striking pressmen, as decided by President Charles Brumback, Bell, and Veon (Tr. 2395–2397 12/13/88).

Meanwhile, the Company was forced to go to great expense in keeping the newspaper in publication without the services of all except 16 (plus 2 on disability) of the 208 journeymen (R. Exhs. 36, 61H, 61i). It brought in management personnel from across the country; began to hire and train largely a new staff of pressmen, many of whom had never seen a press before; and used massive amounts of overtime (R. Exh. 64).

On October 24, over 3 months after the strike began, the Company obviously perceived itself in a stronger bargaining position. Although it was still understaffed and needed the skills of the striking journeymen, it had demonstrated that it could continue publishing the newspaper without them. It had not informed the new employees in writing that they were permanent replacements (Tr. 3925–3926 1/19/89), but

I infer that at least by this time it was determined not to displace them with returning strikers.

Under these circumstances company spokesman Veon, in the October 24 negotiations, went beyond the provisions in the Company's October 4 proposal for settling the strike. He was not content to maintain his hard position on these mandatory subjects of bargaining, as he was legally entitled to do. He went further and demanded his zipper clause–section 1(b) interpretation which, as found, amounted to changing the scope of the bargaining unit. Then in negotiations on November 13, two meetings later, he unlawfully bargained to impasse on this permissive subject, making it clear that his demand was a condition for signing an agreement.

The question is whether this unlawful bargaining prolonged the strike, converting the economic strike on November 13 into an unfair labor practice strike. As held in as held in *NLRB v. Jarm Enterprises*, 785 F.2d 195, 203–204 (7th Cir. 1986), ''The mere fact that an unfair labor practice was committed during the course of a strike does not automatically transform the action into an unfair labor practice strike. This transformation is contingent on the employer's activities serving to 'aggravate or prolong the strike.'''

2. Union's response to impasse demand: ''No way''

Union President Hagstrom recalled that on October 24, when Veon interpreted section 1(b) to limit the Union's work jurisdiction to items 1–7, Veon stated ''what you see is what you get,'' that it was ''strictly the company's prerogative whether or not we can do the work,'' and ''They can allow us to do it, or they can have anybody they want to perform it'' (Tr. 2132 1/18/88).

Hagstrom credibly testified that on hearing that this ''was the extent of the work jurisdiction for the Pressmen's Union . . . that . . . startled, it astounded us.'' Expressing this dismay in his bargaining notes, he simply wrote his determination: ''No way.'' (Tr. 2132, 2134 1/18/88; R. 25 p. 117.) (Throughout Hagstrom's testimony, particularly during over 4 days of extensive cross-examination, he impressed me most favorably my by his demeanor on the stand as a sincere witness, doing his best to recall accurately what occurred.)

Labor Relations Manager Howe's testimony shows that Hagstrom referred to an adverse reaction from the union membership. Howe testified from his bargaining notes that Hagstrom stated that ''some of our more suspicious members say you want to take work away.'' Veon responded, ''That could happen. They are suspicious.'' (Tr. 414 11/6/87.)

International Vice President De Vito (who also appeared to be an honest witness) credibly testified that ''It was absolutely devastating, what [Veon] said,'' because there had never been a problem or misunderstanding for years and years in applying section 1(b) ''to all the work that we performed in the pressroom'' (Tr. 2556, 2558 1/20/88). As discussed above, Howe quoted from his notes that De Vito declared: ''We are not going to have [an] open-ended contract based on . . . your interpretation and your zipper clause.''

Despite this testimony from his notes in January 1988, Howe testified a year later in January 1989 that he did not recall the Union being surprised at the Company's position on section 1(b) in the October 24 meeting and that ''it wasn't a major issue'' (Tr. 3848 1/18/89). I discredit this recollection.

Although Company Attorney Kulas also claimed that section 1(b) ''was not a major issue in the negotiations'' (Tr. 1276 12/6/88), he conceded that ''the focus and from what was said across the table of concern was not with 1(b), but with the zipper clause'' (Tr. 1291 12/6/88). Previously he had testified: ''I think from all the discussions, one of the most crucial items is the zipper clause'' (Tr. 1232 12/1/88).

I do not rely on Pressroom Manager Frank Malone's testimony about any of the negotiations. He claimed he never knew Veon to be designated, and would not describe Veon as being, the chief company spokesman and never heard of the zipper clause being a major issue (Tr. 2167, 2169 12/8/88; 3193–3194 1/16/89). As discussed later, by his demeanor on the stand he appeared willing to fabricate any testimony that might help the Company's cause.

3. ''Stumbling block'' to any agreement

International Vice President De Vito credibly testified (Tr. 2580–2581 1/20/88) that Veon's application of the zipper clause to section 1(b) was and remained a ''stumbling block'' to any agreement. As he had informed Veon on October 24, ''We are not going to have [an] open-ended contract based on . . . your interpretation and your zipper clause.'' Yet Veon was demanding that application of the zipper clause as a condition for reaching an agreement.

In determining whether Veon's unlawful bargaining to impasse on this permissive subject prolonged the strike, I attach considerable weight to De Vito's reaction, as well as that of Union President Hagstrom and the other members of the union bargaining committee. They obviously had much discretion in determining what would be a satisfactory agreement for the membership. They had been in negotiations with the Company for months, both before and after the strike, without any of the Company's proposals being submitted to the membership for approval. In fact, the Union later make the unconditional offer on January 30 to return to work without a membership vote.

There was ''no way'' that International Vice President De Vito and the other members of the committee could recommend membership acceptance of the Company's November 13 ''firm and final'' offer as long as Veon demanded, as a condition for signing an agreement, an interpretation of section 1(b) that would deprive the unit pressmen of contractual jurisdiction over most of their traditional pressroom work.

By including that unlawful impasse demand in the offer, Veon prevented the Union from evaluating the mandatory subjects in the offer separately, along with a reappraisal of its bargaining stance in light of its obviously poorer bargaining position.

By this date, most of the 240 or so strikers (R. Exh. 36) had already been replaced (G.C. Exh. 98). (The Company hired 74 replacements after November 13, as discussed later.) If the strike could be settled, at least many of striking journeymen who had not been replaced could still be reinstated, restoring their guaranteed working-life job security (see G.C. Exh. 73, sec. 28). But the strikers had been outside the plant nearly 4 months, the newspaper was being published without them, and a new lower wage (about 60 percent of the journeyman rate) was being paid for semiskilled employees in the absence of the striking journeymen (G.C. Exhs. 49 p. 6, 98). A settlement might require either acceptance of the

Company's ''firm and final'' offer or the negotiation of a compromise with greater union concessions.

The Company's offer, however, came with Veon's impasse demand, which disrupted such a separate evaluation and reappraisal. As Veon recalled at the trial, the Company's proposal and Veon's interpretation ''absolutely prevented further compromise because he had destroyed our unit and the work . . . customarily performed . . . and practically disenfranchised [our people] from work in the pressroom if the publisher so desired'' (Tr. 2645 1/21/88).

Veon's November 13 letter (G.C. Exh. 100), received after the meeting that day, provided no hope that he would retract his oral demand. Answering a question at the meeting about the Company's intent to assign the presswork, Veon stated in the letter: ''We see no significant difference from how we have assigned the work in the past''—indicating only Veon's present intention.

It was under these circumstances that the union bargaining committee—instead of reappraising the Union's stance in the negotiations—sought Veon's written position on his oral demand before submitting the Company's ''firm and final'' offer to the membership with a recommendation for rejection. On November 18 President Hagstrom wrote Veon a letter (G.C. Exh. 101), asking for clarification of the final offer. The fifth question read:

> In respect to your Section 1(b), would our members if they return to work continue to perform work described in our Section 1(b), such as: [list of 18 traditional functions in the pressroom and reel room].

Veon's November 25 response (G.C. Exh. 102) confirmed his oral demand. After claiming that ''Sometime ago'' the Company and Union ''reached impasse in negotiations,'' Veon answered the first four questions, and then the fifth in part as follows:

> Although *our proposed contract gives the union no contractual jurisdiction over the work described in your letter*, the company has no current plan to change the work assignment but will determine make-up of the work force of employees necessary to perform that work. [Emphasis added.]

4. Membership's rejection

At the December 1 special meeting, all the differences between the Company and the Union were discussed, but the vehement opposition to Veon's zipper clause–section 1(b) interpretation set the tone of the meeting. The bargaining committee was unanimous in opposing the offer (R. Exh. 35).

Chapel Chairman Clifford Carsten credibly testified (Tr. 1082 12/4187) that he told the members that it was the Company's contention, concerning items 1–6 in section 1(b), ''that's all we did, and it was *out of the goodness of their heart* [emphasis added] that they were letting us run the papers.'' I discredit his recollection that Veon stated before January 30 that ''we never had jurisdiction'' (see Tr. 2314 1/19/88).

Union President Hagstrom credibly testified that he read his November 18 letter to Veon, read Veon's November 25 response (containing Veon's answer to question 5, that the Company's offer ''gives the union no contractual jurisdiction over'' the listed presswork), and told the members ''what the amount of work [there] would be'' if they called off the strike and went back to work. ''I told them they would perform whatever was encompassed in [items] one through six and we read it off again.'' The members ''were irate and the language at times became a little vitriolic or almost blasphemous.'' As expressed by ''Quite a few members'' (four of whose names Hagstrom remembered), ''The men felt they were not receiving what was theirs over many years'' and ''It was one of the major reasons for turning it down.'' (Tr. 865–867 12/2/87.)

Hagstrom credibly testified that this interpretation of section 1(b) was one of the ''overriding'' issues at the meeting (Tr. 2244–2245, 2256 1/19/88).

International Vice President De Vito spoke next and discussed the many unresolved issues (Tr. 2634–2641 1/21/88). As he credibly testified, he told the members that under Veon's section 1(b) proposal, ''the company could assign all other work other than those seven items to anybody they saw fit to do so.'' As he credibly testified, ''a number of questions'' were asked about the Company's position on 1(b) and ''I said that the work that you normally do, the company under its proposal need not provide you with that work and can give it to anyone they see fit to do so'': to drivers, editorial people, photo engravers, or ''anybody they wish.'' He explained that under the zipper clause, ''all work embracing [the operation of all printing] presses, formerly recognized, could be considered a past practice and no longer allowable under the terms of the contract.'' (Tr. 2569–2570, 2574 1/20/88.)

I find that Veon's application of the zipper clause to the Company's section 1(b) proposal was a major cause of the overwhelming rejection vote: 328 to 5 (G.C. Exh. 105). I infer that a serious reappraisal of the Union's bargaining stance was precluded by the strong belief, caused in large part by Veon's unlawful impasse demand, that the Company was bargaining in bad faith.

I find it wholly speculative what the outcome of the special meeting would have been, or whether there would have been a membership meeting without a prior reappraisal by the committee and further negotiating, in the absence of Veon's unlawful impasse demand.

5. Deceptive defense to charge

On December 3, the second day after the special meeting, the Union filed a Section 8(a)(5) surface bargaining charge in Case 13–CA–25535 (G.C. Exh. 1A). It alleged that the Company's (November 13) ''final offer,'' coupled with the November 25 explanatory letter, ''gave the employer the unilateral right . . . to take the work jurisdiction of the [Union] and give it to other employees.'' (Emphasis added.) It specifically cited the Company's insistence on the zipper clause.

(The charge included further allegations, not found meritorious, that the Company entered bargaining with a fixed position, presented ''its 'final offer' which took away long accepted benefits and working conditions and which gave the employer the unilateral right to reduce wages by 50%,'' and insisted on ''an exceedingly strong management rights clause.'')

After filing the refusal-to-bargain charge, the Union resumed bargaining on mandatory subjects while trying to persuade Veon to withdraw his zipper clause–section 1(b) interpretation which, in the language of the charge, ''gave the

employer the unilateral right . . . to take the work jurisdiction of the [Union] and give it to other employees.''

In the next meeting on December 18 (over a month after the November 13 ''firm and final'' offer) the Union again explained that items 1–6 were added to section 1(b) to resolve a jurisdictional dispute (not to limit the Union's jurisdiction). Veon responded, ''That makes my point as to why we need a clean new agreement.'' (Tr. 1606–1607 12/6/88; G.C. Exh. 165 pp. 181–182.)

On January 3 International Vice President De Vito asked if Veon was saying that ''only 1 through 7 apply to jurisdiction,'' and Veon answered, ''That is what [section 1(b)] says.'' De Vito responded, ''If what you say is correct, you deprive us of all our jurisdiction,'' and there was a ''Heated discussion over interpretation.'' (Tr. 1536–1537 12/5/88.)

By January 24, when Veon gave a pretrial affidavit (G.C. Exh. 168), the Company had developed a defense to the charge, claiming in effect that the Company's proposed new zipper clause should be applied retroactively to sections 1(b) in the 1979–1985 and earlier agreements. He swore (at 2–3):

> Regarding Section 1(b), it is my position that the bargaining unit has had exclusive jurisdiction over items 1–6 *under prior contracts. That is all the work they have ever had*. . . . Historically, the bargaining unit has performed most if not all the production work in the pressroom and the reel room. *This work*, however, other than the items 1–6 list in section 1(b), *was assigned* to the pressroom *solely at the Company discretion*. . . .
>
> . . . *The Company has the right to assign this work*, work other than items 1–7, *to another department or bargaining unit*. However, as I explained to the Union during bargaining, and in my November 25th letter to them, the Company has no intention *at this time* to do this. . . .
>
> The bargaining unit under the [Company's] contract draft is the same as it was in past contracts. *I have not proposed any change in that unit in my proposals.* [Emphasis added.]

I find that this was obviously a deceptive defense. The 1979–1985 agreement (G.C. Exh. 155) did not contain the new zipper clause. The old zipper clause (sec. 46) merely stated that certain documents ''shall constitute the entire agreement between the parties.'' An arbitration award involving the Company (the Fleischli award, G.C. Exh. 167; Tr. 3613 1/18/89) had specifically held (at 38) that the zipper clause in the 1979–1985 agreement did not preclude consideration of past practice, contrary to Veon's interpretation of the Company's proposed new zipper clause.

Moreover, one of the Company's own exhibits (R. Exh. 16) is the new 1985–1988 agreement that the Union signed August 1, 1985, with the Company's competitor, the Sun-Times. It contains the identical section 1(b) language of the 1979–1985 agreement (except Publisher substituted for Employer), but also the old zipper clause (Tr. 3694 1/18/89), which permits consideration of past practice. The Company undoubtedly realized that the Union would not have signed the new agreement if the Sun-Times had substituted the Company's new zipper clause and had interpreted it as Veon began doing on October 24.

Thus, the Company was seeking to defend the Union's December 3 charge by contending that the Union's contractual jurisdiction had always been limited to make-ready items 1–6. I find this contention, based on a retroactive application of the new zipper clause to section 1(b), to be untenable.

6. Failure to withdraw impasse demand

a. *Bargaining strategy*

About January 29 the Company, like the Union, learned that the General Counsel would issue a complaint on the Union's December 3 refusal-to-bargain charge. The General Counsel was agreeing with the Company that it had not engaged in surface bargaining on mandatory issues. The General Counsel was agreeing with the Union, however, that the Company's November 13 ''final'' offer, coupled with Veon's November 25 letter, was an unlawful insistence on a demand that ''gave the employer the unilateral right . . . to take the work jurisdiction of the [Union] and give it to other employees.'' The complaint would allege unlawful insistence to impasse on this permissive subject, changing the scope of the bargaining unit. (Tr. 2296, 2311 1/19/88.)

As a practical matter, this was too late for the Company to withdraw its application of the new zipper clause to section 1(b), limiting the Union's contractual work jurisdiction to make-ready items 1–6. Such a withdrawal could appear to be an admission that this application of the zipper clause had converted the economic strike to an unfair labor strike, entitling strikers replaced after the conversion to reinstatement on an unconditional offer to return to work.

On the other hand, as long as the Company continued to insist on this application of the zipper clause as a condition for signing an agreement, there was little if any hope of settling the strike until the legality of its demand could be decided.

The evidence shows that to solve this dilemma, the Company decided on the following strategy:

> First, it would pretend that the wording of section 1(b) was the problem, not the application of the new zipper clause.
>
> Second, it would return the wording of section 1(b) to the exact language in the 1979–1985 agreement, although retaining the new zipper clause.
>
> Third, it would tell the Union in negotiations that this old section 1(b) means what it always meant—ignoring the substitution of the new zipper clause (which precludes the use of past practice in showing past work assignments) for the old zipper clause (which had been construed to permit the use of past practice in arbitration).
>
> Fourth, it would refuse to say whether this old section 1(b) would give the Union contractual jurisdiction over only make-ready items 1–6 (as Veon demanded to impasse on November 13 and as explained in his November 25 letter).
>
> Fifth, it would accuse the Union of trying to expand its work jurisdiction by seeking to retain its contractual jurisdiction over operating the presses.

In support of this strategy, the Company argues in its brief (at 67–68):

> [W]hen the Company reverted to old contract language on section 1(b) on January 30, 1986, the parties still did not reach an agreement.
>
> Further, the Company changed its proposal on section 1(b) before the Union offered to return [later in the day on January 30]. Thus, even if the strikers were unfair labor practice strikers for some period of time, at the time that they offered to return they were economic strikers.

To the contrary, I find that in carrying out its bargaining strategy, the Company failed to withdraw Veon's application of the new zipper clause to section 1(b), changing the scope of the bargaining unit.

b. *Revised January 30 proposal*

On January 30 Veon presented a new proposal (G.C. Exh. 76) to return the wording of section 1(b) to the exact language in the 1979–1985 agreement. Actually, the new proposal retained the identical section 1(b) language in the Company's November 13 proposal (G.C. Exh. 73), except that the words in the first line, ''the above Section 1.(a) is defined,'' were changed back to read ''the above is defined'' (not changing the meaning) and item 7 (covered elsewhere in the proposal) was deleted. The new zipper clause remained the same.

In negotiating that morning, as Company Attorney Kulas testified (reading from his bargaining notes), Veon told the union that ''we would propose to go back and use the language of 1(b) from the old contract.'' Union President hasstrom asked, ''What does that mean?'' Veon responded, ''Exactly what it meant under the old contract.'' The union attorney asked ''Does your letter of November 25th still stand?'' Evading the question, Veon responded, ''As of January 30, 1986, we have given a revised proposal. Whatever the language has meant in the past, it still means.'' International Vice President De Vito stated, ''That is where our differences lie.'' Veon responded, ''Now you want me to be an arbitrator.'' Veon added: ''We gave you a new proposal as of today. We are satisfied with that language. What it means or doesn't mean is right there.'' (Tr. 1206–1207 12/1/88.)

In response, De Vito stated: ''With your proposal, the November 25th letter and zipper, we might have nothing.'' Veon did not deny that he was still applying the zipper clause to section 1(b). (Tr. 1654, 1713 12/6/88.) At the close of the meeting, both De Vito and hasstrom stated that the Union's November 5 proposal (listing the traditional assignments) was their current section 1(b) proposal (G.C. Exh. 165 p. 215).

c. *Veon's February 4 explanation*

On February 4 Veon wrote the union attorney a letter (G.C. Exh. 113), stating that ''Your failure to agree to the old Section 1(b) clearly shows that the union is seeking an expansion of Section 1(b) as it existed'' before. He gave the following explanation:

> This proposal is the exact language contained in the [1979–1985 agreement] with no change; as I have stated before concerning Section 1(b) [evidently referring to his January 24 pretrial affidavit, to which the Union was not privy], our proposal is intended to mean whatever it has always meant. . . . You were clearly told [on January 30] it meant ''no change'' from the old contract. Furthermore, our proposal on a zipper clause is in no way to be misconstrued by you as an attempt to . . . change the definition of the bargaining unit.

Veon still failed to answer the union attorney's question whether Veon's November 25 letter still stands. By failing to do so, Veon was concealing from the Union whether the Company would later argue: ''We told you in writing on November 25 that almost identical language meant you had no contractual work jurisdiction beyond make-ready items 1–6.''

I find that the purpose of the letter was to support the Company's deceptive defense to the refusal-to-bargain charge, not to answer the Union's question whether Veon was still proposing to limit its work jurisdiction to the make-ready items 1–6 in section 1(b).

d. *Continued evasion*

On February 12 (5 days after the complaint issued February 7) the union attorney asked Veon in a letter (G.C. Exh. 117) if, under his interpretation of section 1(b), ''running of the presses is part of our bargaining unit.'' Veon on February 24 (G.C. Exh. 119) responded in part: ''Your feigned ignorance on this issue is a transparent attempt to preserve your ridiculous unfair labor practice charge. It is unfortunate that you choose to negotiate in this way.''

In a meeting on February 27, 1986, the Union spent most of the morning session trying to get Veon to explain what he meant in the January 30 meeting and in his February 4 letter. (See pp. 4–15 of Labor Relations Manager Howe's February 27 handwritten bargaining notes, G.C. Exh. 176; Tr. 724–729 11/6/87.) These were some of Veon's answers:

> That's your interpretation. No one else's. [At 7.]
>
> There's no sense in discussing that anymore. [At 8.]
>
> We'll litigate Board complaint there. Not going to give you any more interpretation. [At 9.]
>
> I think that (2/4 letter) explains our position as well as we can explain it. [At 10.]
>
> You're proposing a modification of 1(b) and we've said let's agree on old language. [At 11.]
>
> Why do you need the answer. We've answered repeatedly. Said 1(b) means what it meant in past. [At 12.]
>
> You know what it means. That's why you . . .have proposed . . . to expand 1(b) because you know what it doesn't mean. [At 13.]
>
> You're still trying to litigate Board complaint. . . . The Board complaint will be litigated and we're going to prevail. [At 14.]
>
> We've given you our response. Do you want to spend two hours on this. [At 15.]

In later negotiations Veon persisted in giving evasive answers. On August 29, 1986 (the next to the last bargaining session), however, he at least strongly implied that he was

proposing to apply the new zipper clause to the old section 1(b) (G.C. Exh. 176 pp. 4–7). As shown in Labor Relations Manager Howe's notes (at 6–7), Veon and Union Attorney Charone stated:

> *Veon*. . . . Terms of the contract are what they are and what you see is what you get. I'm specifically talking about 1(b). We don't want any change. You want changes in 1(b). You want more than what you had in the past.
>
> *Charone*. Have to comment. Our position [is that] it's the work we always did. Your position [is] that all past practice [is] gone w/ zipper. With that, we couldn't go to an arbitrator and say past practice means that we have claimed that work [before] although not stated. So, it's your change that required us to do that. You know that w/ zipper you could say it is not there and you don't have it.
>
> *Veon*. We want a zipper clause and we want no change in what has been in the past in the contract. What it says you got.

I find the evidence clear that Veon did not withdraw his unlawful application of the Company's proposed new zipper clause to section 1(b). I therefore agree with the General Counsel's contention in his brief (at 47) that the Company ''continued to insist on its illegal proposals after January 30, 1986.'' I reject the Company's contention in its brief (at 67–68) that by reverting to the ''old contract language on section 1(b) on January 30 . . . . the Company removed any possible unfair labor practice.''

Accordingly, I find that in the negotiations on and after January 30, the Company continued to refuse to bargain in good faith by making the same illegal impasse demand.

7. Concluding findings on conversion of strike

On October 24 Company Vice President Veon first made the unlawful impasse demand that, as a condition for the Company's signing an agreement, the proposed new zipper clause be applied to section 1(b) to limit the Union's contractual jurisdiction to items 1–7. This demand would deprive the Union of contractual jurisdiction over the unit employees' traditional work of operating the presses and permit the Company to alter the composition of the bargaining unit at will, merely by reassigning pressroom work to nonbargaining unit employees.

International Vice President De Vito's response was that ''We are not going to have [an] open-ended contract based on . . . your interpretation and your zipper clause.'' Yet on November 13 Veon bargained to impasse on the demand, as part of the Company's ''firm and final'' offer.

Even apart from De Vito's response, the unlawful impasse demand would naturally be an obstacle to the successful negotiation of an agreement. As the Board held in *Newspaper Printing Corp.*, 232 NLRB 291, 292 (1977), citing *Doug v. Longshoremen ILA (N.Y. Shipping Assn.)*, 241 F.2d 278, 282 (2d Cir. 1957): ''Parties cannot bargain meaningfully about wages or . . . conditions of employment unless they know the unit for bargaining.'' Here, the Union could not ''know the unit for bargaining'' as long as the Company was bargaining to impasse on its proposal to permit it to alter the composition of the bargaining unit at will. As in *Standard Register Co.*, 288 NLRB 1409 (1988), the Company's demand would give it ''unfettered discretion to redefine the unit at any time by changing the assignment or work.''

The Company, however, argues in its brief (at 13–14) that because of ''many other major issues that were unresolved. . . . If there was an impasse of the sort alleged in the complaint, it did not extend the strike by so much as a microsecond.'' It further argues (at 67) that ''As long as the Company maintained its position on the call room, classifications, supervisors, and management rights, the parties were not going to reach an agreement.'' These arguments ignore both the status of the strike and the disruptive effect on the bargaining, as well as what happened at the membership ratification meeting.

As found, the Union was obviously in a poorer bargaining position than before the strike. By November 13, when the Company made the ''firm and final'' offer, the strikers had been outside the plant nearly 4 months, most of them had already been replaced, and a settlement might require either acceptance of the Company's offer or the negotiation of a compromise with greater union concessions than before the strike. By including the unlawful impasse demand in the offer, Veon had disrupted the bargaining in two ways.

First, the unlawful demand precluded separate consideration by the union committee of the mandatory bargaining issues. Second, it in large part caused the Union to conclude that Veon was bargaining in bad faith, not seeking an agreement.

The result was that the union bargaining committee—without reappraising the Union's stance in the negotiation—recommended that the offer be rejected. Then at the membership meeting, as found, Veon's unlawful impasse demand was a major cause of the union membership's overwhelming rejection vote: 328 to 5. Also as found, it is wholly speculative what the outcome of the special meeting would have been, or whether there would have been a membership meeting without a prior reappraisal and further negotiations, in the absence of the demand.

Following the rejection the Union filed the refusal to bargain charge. On January 30, after the General Counsel found merit to the part of the charge alleging an unlawful insistence on a demand that ''gave the employer the unilateral right . . . to take the work jurisdiction of the [Union] and give it to other employees,'' the Company (as found) engaged in evasive bargaining on this permissive subject. It never withdrew its unlawful impasse demand.

In view of these findings I reject the Company's contention that its interpretation of section 1(b) did not extend the strike. I find that the Company relies purely on speculation in arguing that its demand had no effect on prolonging the strike because the union membership would have rejected the offer anyway.

Having found that the General Counsel has proved that the unlawful impasse demand was a major factor in the rejection of the Company's November 13 offer to settle the strike, I find, as required in *C-Line Express*, 292 NLRB 638 (1989), that the General Counsel has established ''that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage.''

I therefore find that the economic strike was converted into an unfair labor practice strike. I further find that the date of the conversion was November 13, when the unlawful im-

passe demand precluded separate consideration by the union bargaining committee of the mandatory subjects of bargaining in the Company's ''firm and final'' offer.

C. *Posting Conditions Without Lawful Impasse*

No progress was made in the last negotiations on September 22, 1986 (Tr. 1250–1251 12/2/88). The trial in this proceeding had been delayed, and the Company's impasse demand was still awaiting litigation.

On November 1, 1986, after again declaring an impasse (G.C. Exh. 153), the Company issued a document entitled ''Posted Conditions of Employment'' (G.C. Exh. 86B), recognizing the Union as the exclusive collective-bargaining agent and changing conditions of employment as proposed in its last offer to the Union (G.C. Exh. 85).

The Company argues in its brief (at 103) that ''After 59 bargaining sessions covering the better part of two years, with two dozen issues still in dispute, and contemporaneous recognition on both sides that further bargaining would be futile, the parties had reached impasse.''

As found, however, since November 13, 1985, the Company had been refusing to bargain in good faith by making, as a condition for signing an agreement, the unlawful impasse demand that the scope of the bargaining unit be changed to permit it to alter the composition of the unit at will merely by reassigning presswork.

Because of this unlawful demand, I agree with the General Counsel's contention in its brief (at 103) that there could be no lawful impasse in bargaining. As held in *United Contractors*, 244 NLRB 72, 73 (1979), ''It is well established . . . that no [valid] impasse can exist in the presence of bad-faith bargaining.''

I find, as alleged in the amended complaint in Case 13–CA–25535 as amended at the trial (Tr. 259, 272 10/18/88; G.C. Exh. 194) that the Company on November 1, 1986, implemented changes in working conditions when a good-faith impasse did not exist, further violating Section 8(a)(5) and (1) of the Act.

D. *Refusal to Reinstate Unfair Labor Practice Strikers*

On January 30, after learning that the General Counsel was issuing a complaint on its December 3 refusal-to-bargain charge, the Union made an unconditional offer (G.C. Exh. 112) for the striking employees to return to work. On February 5 the Company responded (G.C. Exh. 115) that permanent replacements had been hired, that there were no current vacancies, but that as vacancies became available, they would be filled from a preferential hiring list. The picketing continued. The parties later agreed on a preferential hiring list (R. Exh. 36), listing 240 names.

Thus, the Company was not respecting the employees' rights as unfair labor practice strikers since the conversion of the strike on November 13. As held in *NLRB v. Charles D. Bonanno Linen Service*, 782 F.2d 7, 10–11 (1st Cir. 1986), enfg. 268 NLRB 552, 554 (1984):

> It is well settled Board law that the conversion of a strike into an unfair labor practice strike, while not enhancing the strikers' reinstatement rights vis-a-vis permanent replacements hired during the preconversion economic strike, does give the strikers the right to force the dismissal of any replacement hired after conversion, on an unconditional request for reinstatement.

In that case all 12 strikers had been replaced before the May 3, 1986 conversion of the economic strike. As the Board found, 268 NLRB at 554, the employer had hired a total of 17 permanent replacements before May 3 and had terminated 2, leaving 15 permanent replacements at the time of the conversion. Between May 3, 1986, and February 1987, when the strikers offered to return to work, the employer hired four additional permanent replacements and terminated five. Thus the employer's ''work force consisted of 14 permanent replacements, 10 of whom were hired before conversion and 4 afterwards.'' The court enforced the Board's order that the employer must reinstate 4 of the 12 former strikers, dismissing if necessary the 4 permanent strikers hired after the conversion.

Here, before the July 18, 1985 strike, there were 257 full-time nonsupervisory employees in the bargaining unit, as shown by the Company's records (R. Exh. 67i). This number (excluding the nonunit clerical employees, coordinator, and foremen) omits from the total of 314 persons in the bargaining unit the following: 40 supervisory men-in-charge (listed as journeymen, see Tr. 1769–1770 1/14/88), 14 part-time juniors, and 3 employees on disability. A total of 185 of the 208 journeymen went on strike (2 were on disability, 1 resigned, and 4 retired), and most of the full-time juniors and platemakers also joined the strike.

On January 30, when the employees offered to return, there were 295 employees in the bargaining unit (plus 2 journeymen and a junior on disability status), as shown in the Company's carefully audited records (R. Exhs. 67H and 67i; Tr. 981 11/30/88). In this number there were 22 journeymen, 27 apprentices, 218 pressroom employees, 4 juniors, and 24 plateroom employees.

An analysis of these records shows that the 295 employees consisted of the following: (a) nonstriking and returning-striker employees remaining on prestrike jobs: 21 (16 journeymen, 4 juniors, and 1 platemaker), (b) promoted nonstriking and returning-striker juniors: 25 (23 apprentices and 2 pressroom employees), (c) outside replacements hired (or transferred) on or before November 13: 175 (4 journeymen, 4 apprentices, 152 pressroom employees, and 15 platemakers), and (d) outside replacements hired after November 13: 74 (2 journeymen, 64 pressroom employees, and 8 platemakers). Thus, among the persons still employed January 30, the Company promoted 25 employees and hired or transferred 175 permanent replacements on and before the November 13 conversion of the strike and hired 74 replacements after the conversion.

I find it clear, as the court held in *NLRB v. Charles D. Bonanno Linen Service*, above, 782 F.2d at 10–11, that the conversion of the strike ''does give the strikers the right to force the dismissal of any replacement hired after conversion.''

I therefore find that the Company violated Section 8(a)(3) and (1) by refusing to reinstate 74 unfair labor practice strikers on January 30, displacing the 74 replacements hired after the November 13 conversion of the strike. I find that the remaining unfair labor practice strikers, who were permanently replaced on or before November 13, have the same reinstatement rights as economic strikers.

I also find, as alleged, that this refusal to reinstate the 74 unfair labor practice strikers further prolonged the unfair labor practice strike.

E. *Refusal to Reinstate Economic Strikers*

1. Overview

From January 30, 1986, until the close of trial on January 19, 1989, the Company failed to recall any of the striking employees. The number of regular employees had dropped from 295 on January 30, 1986, to 182 by the end of 1988 (R. Exh. 75). (On December 31, 1988, there remained 7 of the 19 temporary employees hired through the Union's call room in December 1987 under a court order enforcing the Fleischli arbitration award.)

Permanently replaced strikers' recall rights are defined in *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970):

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement on the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his *burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons*. [Emphasis added.]

The Company states in its brief (at 83) that it ''will recall strikers when the pressroom needs additional employees.'' It contends (at 70), however, that it has not recalled any of the strikers on the preferential hiring list ''because the Company's need for employees in the pressroom has declined due to increased productivity and efficiency.'' The General Counsel disputes much of the Company's evidence and contends, in any event, that the Company failed to recall strikers as vacancies became available, deliberately operated short-handed, and used overtime instead of recalling strikers.

There clearly was a large increase in overtime during much of the relevant period. This period began November 4, 1986, which was 6 months before the May 4, 1987, filing of an amended charge in Case 13–CA–25535 (see G.C. Exh. 1ZZZ). The Company's records (R. Exh. 64) show that in November and December 1986 the overtime in the press department totaled 12,952 hours as compared to 8974 hours in those months in 1984 before the strike—an increase of 44 percent. During the next 2 months, in January and February 1987, the overtime totaled 8510 hours as compared to 5152 hours in those months in 1985 before the strike—an increase of 65 percent.

Moreover, as discussed later, a confidential internal memo on January 15, 1987, partially explains this large increase in overtime by acknowledging a shortage of eight employees on the night shift, as well as understaffing on the two other shifts.

In 1988, after much delay in the trial of this proceeding, the increase in overtime became even greater. In the first 6 months of 1988 it increased to a total of 24,991 hours as compared to only 12,472 hours during the first 6 months of 1985 before the strike—an *increase of 100 percent* (R. Exh. 64).

The Company contended at the trial that it left the staffing of the press department to Pressroom Manager Malone who, as discussed below, gave obviously fabricated testimony, and to Pressroom Manager William Unger, who replaced Malone on November 24, 1986, without any prior experience in a pressroom and who denied the shortages revealed in the confidential memo.

2. Major goal to hire part-timers directly

As found, one of the Company's major goals in the negotiations (as well as a major cause of the long, costly strike) was to hire its part-time employees directly, without going through the Union's call room.

In its contract proposals the Company had included a provision based on this direct hiring of part-time employees. In each of the proposals from March 28, 1985 (G.C. Exh. 19 sec. 8) through January 30, 1986 (G.C. Exh. 76 sec. 17), it referred to hiring journeymen as part-time employees as follows:

> [The Company] agrees that, with the elimination of the Call Room, part-time journeymen and part-time trainees with six months or more service . . . will be eligible for coverage [by an HMO].

Beginning on June 6, 1986 (G.C. Exh. 80C sec. 17) and continuing in its November 1, 1986 Posted Conditions of Employment (G.C. Exh. 86B sec. 17), the Company deleted the reference to the call room, but provided for HMO coverage to ''part-time employees with six months'' service, indicating no change in its plans to hire directly its part-time employees to work at regular pay. These part-time employees could avoid much of the sixth-day overtime.

This sixth-day overtime (also called overtime shifts or extra-day shifts) is the overtime used when ''we would schedule an employee or ask an employee to work overtime on a single basis [for an entire shift] or a short-term basis'' (Tr. 3274 1/17/89). It is used when there is a shortage of employees or when employees are absent. Employees can be called in on their sixth or seventh day to fill in on a short crew or to run an additional press. If the employees are already at work, they can be assigned to double over and run the press a second ''shift,'' extending the 7-1/2 hour day shift to 15 hours or the 7-hour night shift to 14 hours.

This type overtime can often be anticipated. An example is when the supervisor knows 24 hours ahead of time that there is to be a product size change. He may schedule more employees to ''put on an extra press'' or to add to a crew (if more of the nine units on the press are to be used). (Tr. 3277 1/17/89.)

The Company maintains separate weekly reports of another type overtime, the end-of-shift overtime (Tr. 3302 1/17/89). This is overtime to finish a press run and includes pre-shift training overtime (Tr. 2993 12/16/88). Although this overtime cannot ordinarily be planned, it may be increased if there is a shortage of employees, preventing enough presses from being run.

Before the strike the Company used many journeymen from the Union's call room to work at regular pay, avoiding much of the sixth-shift overtime. Vice President of Operations Bell admitted that the Company used a ''large number'' of these call room employees on a ''daily basis'' (Tr.

2435 12/13,88). During the strike, of course, these part-time journeymen were not available until the January 30 offer to return to work.

3. Decision not to reinstate strikers part-time

On November 4, 1986, after the departure of 61 employees since the strikers offered January 30 to return to work, the bargaining unit was reduced from 295 to 234 employees—23 employees below the 257 prestrike number (R. Exh. 73). The Company was then in a position to benefit from the strike. It had prevailed in its lawful demand to hire its part-time pressmen directly, without going through the Union's call room.

The Company could recall from the preferential hiring list its own employees (fully trained on the complex offset presses after nearly 3 years at the new facility before the strike) and work them at regular pay. There was an obvious need for many of them to work part-time if not on a full-time basis. November 4 fell well into the Company's August–December busy season (Tr. 2354 12/13/88), and the amount of overtime was increasing. The overtime the previous month (October 1986) totaled 7517 hours as compared to 5656 hours in October 1984 before the strike (R. Exh. 64)—an increase of 33 percent. Yet the Company had not recalled any strikers.

Under these circumstances I find that the Company had already decided before November 4, 1986, not to reinstate strikers on a part-time basis to perform this extra work at regular pay. The Company, without consulting with the Union or offering the work to any of its employees on the preferential hiring list, proceeded on and after November 4 to assign the work to its current employees, paying time and a half.

The Company undoubtedly considered itself in even a stronger bargaining position than in October the year before. That was when it decided to make the unlawful impasse demand, changing the scope of the bargaining unit.

Since January 30 it had refused to reinstate 74 unfair labor practice strikers, displacing the 74 replacements hired after the November 13 conversion of the strike. As discussed later, it had refused to furnish the names and addresses of the strike replacements to the Union. It had failed to withdraw its unlawful impasse demand, and on November 1, 1986 (3 days before the beginning of the November 4 limitation period) it had implemented its last offer as Posted Conditions of Employment, despite the absence of a valid bargaining impasse. The Union was still picketing, but the employees had been off the job, outside the plant, over 15 months. The trial of this proceeding to determine the legality of the Company's conduct had been further delayed.

4. Vacancies under Pressroom Manager Malone

a. *Malone's false testimony*

Richard Malone, the pressroom manager from 1984 (Tr. 1732 12/6/88) until he was replaced by William Unger on November 24, 1986 (Tr. 3227 1/17/89), gave obviously fabricated testimony about the assigned overtime before he left the press department.

When asked if he was short staffed before he left, Malone claimed that he did not recall (Tr. 2050 12/8/88). He also claimed that ''we do everything in our power to avoid overtime'' and ''my goal was to reduce overtime to the lowest level possible.'' Yet he claimed: ''I didn't review reports on how many people got overtime. It was not something that I looked at.'' (Tr. 2287–2288, 2295 12/9/88.) (Weekly reports are maintained separately on end-of-shift and sixth-shift overtime, Tr. 3302 1/17/89.)

A week later, on redirect examination, Malone was questioned about a new exhibit in evidence (R. Exh. 64), which revealed that in November 1986, press department employees worked 6236 hours of overtime as compared to 4310 hours in November 1984 before the strike—an increase of 44.6 percent. He evidently realized that unless explained, this large increase in overtime could indicate a shortage of employees and the need for recalling strikers.

There was no breakdown on the exhibit between end-of-shift overtime (which ordinarily could not be planned) and sixth-shift overtime (much of which had previously been assigned to call room employees and could be assigned to employees on the preferential hiring list if recalled). If the increased overtime were end-of-shift overtime, it may not indicate a need for recalling strikers. At the time he could not know that the Company would later decide, as requested (Tr. 2810 12/15/88), to introduce into evidence such a breakdown, in the form of a computer printout of payroll data for November and December 1986 (R. Exh. 73).

Under these circumstances Malone pretended that practically all the overtime being worked was end-of-shift overtime. When asked if he had any idea ''what percentage [of the overtime] would be of one type versus another,'' he answered (Tr. 2994 12/16/88):

> I would say that 98 percent, 99 percent of the overtime was *end of shift* overtime. *1 percent* other overtime. [Emphasis added.]

I discredit this testimony as an obvious fabrication. As the experienced pressroom manager, he must have known better. (By his demeanor on the stand he appeared willing to fabricate any testimony that might help the Company's cause.) The Company's subsequent evidence plainly belies his testimony.

b. *Evidence of understaffing*

The computer printout (R. Exh. 73) shows that on the week ending November 12, 1986, Employee 40 worked two 7-hour extra-day shifts (sixth-shift overtime) and 21.5 end-of-shift overtime hours (totaling 35.5 hours of overtime). This doubled his workweek from the regular 35 hours to *70.5 hours*. Employee 302 also worked two 7-hour extra-day shifts, plus 15.5 end-of-shift overtime hours (totaling 29.5 overtime hours), extending his workweek to *64.5 hours*. Employee 51 worked two extra-day shifts totaling 14.5 hours, and 42 other employees worked extra-day shifts. One of these, EMPLOYEE 67, worked one 7.5 extra-day shift, 20 end-of-shift hours, and 35 regular hours, totaling *62.5 hours*.

Thus, there was a total of *48 extra-day shifts* (sixth-shift overtime) assigned to employees in the press department as overtime, rather than any of it being assigned to employees on the preferential hiring list at regular pay. (These 48 shifts were full 7- or 7.5-hour shifts, except one of 6.75 hours. Compare the total of 50 overtime shifts in the Company's

summary of sixth-shift overtime, R. Exh. 71, which includes some less-than 7-hour shifts.)

During the same week, a total of 38 employees worked 10 or more hours of end-of-shift overtime, 10 of whom worked 14, 14.25, 15, 15.5, 17.50, 20, 20, 21.5, 21.5, and 21.5 hours. In the absence of any other explanation, these long hours of end-of-shift overtime indicate a shortage of one or more running crews, preventing the running of enough presses when needed. (Up to 10 presses can be run at a time.) Employees could have been recalled to fill the shortage of running crews at regular pay, avoiding some of the end-of-shift overtime.

During the next week, while Malone was still the pressroom manager, many employees again worked extra-day shifts. On this week ending November 19, *57 employees worked extra-day shifts*, including Employee 8 who worked two. (These 58 shifts were full 7- or 7.5-hour shifts, except one of 6.5 hours and two of 6.92 hours. Compare the total of 61 overtime shifts in R. Exh. 71.)

These extra-day shifts far exceeded 1 percent of the overtime.

c. *Full-time or part-time vacancies*

The computer printout showing overtime worked in November and December 1986 (R. Exh. 73), as well as the printouts for 1987 and 1988 (R. Exhs. 74 & 75), does not include information for determining whether there were only part-time vacancies for recalled employees to fill, or also full-time vacancies for work 5 days a week. The printout does not show how the extra-day overtime was distributed: whether it was worked only on Fridays and Saturdays (the busiest days), also on Wednesdays and Thursdays (the next busiest days), or also on the other 3 days of the week (Tr. 3480, 3531 1/17/89).

Vice President Bell revealed (Tr. 3077 1/16/89) that the daily payroll records are available because the Company consulted them in preparing its summary of sixth-shift overtime (R. Exh. 71).

Even assuming that all the 106 extra-day shifts during the weeks ending November 12 and 19, 1986, were worked on Friday and Saturday or also on Wednesday and Thursday, and assuming there were no full-time, 5-days-a-week vacancies, I find that there were many part-time vacancies. The Company had placed high priority in the negotiations on eliminating the call room and hiring part-time employees directly to perform such extra work at regular pay, avoiding sixth-shift overtime.

In view of this priority, I find that the Company has failed to sustain its burden of proof that it had ''legitimate and substantial business reasons'' for failing to offer reinstatement on and after November 4, 1986, to employees on the preferential hiring list to fill part-time vacancies. The number of part-time vacancies depends on the number of the vacancies that were full time, as shown by other evidence in the record or by evidence at the compliance stage, particularly evidence of daily distribution of the overtime.

5. Vacancies from November 24, 1986, to February 1987

a. *Knowledge of decision not to reinstate part-time*

The large number of extra-day shifts (sixth-shift overtime) continued after William Unger became the new pressroom manager on November 24, 1986.

The Company's summary of sixth-shift overtime (R. Exh. 71) shows that following the weeks ending November 12 and 19 (when there were 50 and 61 extra-day shifts) these overtime shifts ranged from 40 to 90 through the week ending December 31. This means that the Company was paying overtime for up to 90 shifts a week, instead of reinstating strikers as part-time or full-time Employees to do much of the work at regular pay.

The union counsel asked Unger on cross-examination about recalling strikers (Tr. 3557, 3560 1/17/89):

> Q. Did you ever think about the possibility of bringing strikers back and saying to them, ''I don't know exactly how many days a week you could work, but you could have a regular job. We will call you. You may work two days this week and three days. You may work five days.''
>
> A. No, I have not looked at working less than a five day week.
>
> Q. You never considered this other possibility?
>
> A. No, I haven't.
>
> . . . .
>
> Q. Did you ever think of having people who are vacation replacements who do nothing but fill in for Employees when they go on vacation?
>
> A. The crews handle the vacation themselves.
>
> Q. I am asking another kind of question. Have you ever thought about that as a possibility?
>
> A. No.

I infer that if these were truthful answers, the reason Unger never considered the possibility was his awareness of the Company's decision not to recall strikers as part-time Employees to perform this sixth-shift overtime. As discussed below, a confidential internal memo revealed that Unger's three operations managers were aware of the policy not to ''look outside the Company for additional Employees'' (a clear reference to reinstating strikers).

Particularly in view of the large amount of sixth-shift overtime being worked in November and December 1986 (44 percent more total overtime than in those months in 1984 before the strike), I must discredit some of Vice President Bell's testimony given at the trial on December 13, 1988. This was before the Company introduced into evidence its summary of sixth-shift overtime (R. Exh. 71) on January 16, 1989 and the computer printout of payroll records (R. Exh. 73) the next day.

Bell claimed (1) that it was not his opinion that the ''overtime hours would have been substantially reduced if the company had employed some number of additional people,'' (2) that ''in 1986, I don't think there was a shortage of people''

and ''If anything, I think we had too many people,'' (3) that ''this overtime is *generally at the end of a shift* [emphasis added],'' and (4) ''It is my observation as the Vice President of Operations that we had too many people in the press area'' throughout 1986 (Tr. 2367 12/13/88).

To the contrary, the confidential internal memo (discussed below) showed crew shortages on all three shifts, extending into January and February. Furthermore, as found, during the week ending November 12, 1986, the Company assigned 48 extra-day shifts instead of recalling any of the strikers, and in other weeks even more extra-day shifts. (When giving some of his testimony, Bell impressed me by his demeanor on the stand as being less than candid.)

b. *Internal memo showing full-time vacancies*

In January and February 1987, as found, there was a 65-percent increase over the prestrike overtime in those months in 1985.

Although, as Vice President Bell testified, the ''heavy period'' for the newspaper is ''typically August through December'' (Tr. 2354 12/13/88), this time the large number of extra-day shifts extended into February 1987. The Company's records (R. Exh. 71) show that the total extra-day shifts ranged from 29 to 52 from the week ending January 7, 1987, through the week ending February 18, 1987.

A partial explanation for this continued high overtime—as well as the high overtime going back to November 4, 1986—is a confidential memo from Night Operations Manager Tony Pondel to Pressroom Manager Unger, dated January 15, 1987 (G.C. Exh. 207). It not only acknowledged a shortage of eight Employees on the night shift and shortages on the other two shifts as well, but it referred to a policy of not looking ''outside the Company'' for additional Employees (a reference to reinstating strikers). The memo stated in part:

> I have tentatively worked out a plan to eliminate one running crew on third [night] shift. This would *free up 8 people* which ironically happens to be the *same number of Employees we are short on night*. I planted the seed with [Operations Managers] Tom Steck and Mike Calow and early indications are that we can conceivably reduce the pressroom staffing by 24 people [7 Employees and a crew supervisor on each of the 1st, 2d, and 3d shifts]. While *we will not actually reduce headcount* from the present work-force, it does mean that we *do not have to look outside the Company for additional Employees*. . . . Estimated wage savings from the three crew reduction is conservatively $500,000. [Emphasis added.]

Unger explained at the trial (Tr. 3369, 3380–3386 1/17/89) that there would be no reduction in the head count with the elimination of the 15 weekly press runs (1 press run on each of the three shifts 5 days a week) because the operations managers agreed that the 14 pressmen being relieved (on the day and afternoon shifts) were needed to fill out other crews on those first and second shifts.

Yet Unger denied on direct examination that there was any shortage of Employees in the press department on January 15, 1987, the date of that memo (Tr. 3352 1/17/89). I discredit the denial and rely on the documentary evidence. (None of the operations managers testified.)

Besides the 8 Employees Pondel revealed the Company was short on the night shift, 14 other pressmen were needed to fill out other crews. Thus, before Pondel recommended on January 15, 1987, that the 15 press runs be eliminated, the pressroom was operating with a shortage of 22 Employees. Despite the Company's denials that it was operating short-handed to avoid recalling Employees on the preferential hiring list, I find that the confidential memo indicates otherwise.

It took until late February for the Company to accept and implement Pondel's plan (Tr. 3354 1/17/89). The Company then reassigned the 14 Employees from the eliminated crews on the first and second shifts to the other crews that were operating short-handed (Tr. 3372–3373, 3375 1/17/89).

c. *Failure to fill full-time vacancies*

Vice President Bell testified that it was the responsibility of the pressroom manager to decide whether strikers should be recalled (Tr. 2377 12/13/88). Even if true, I find that this testimony is not applicable to the 3-month period after Unger replaced Malone as pressroom manager.

Unger had never worked at the trade and had no experience in the operation of a pressroom. He admitted that when Operations Manager Pondel raised the question about pressroom staffing, ''I was still very new and hadn't formed all my conclusions that we could run with fewer people all the time on a scheduled basis. . . . We just reassigned the people back to what I was told the scheduling should be to run a press. . . . At that particular time, I was not that concerned with the staffing of the presses. I was still trying to get my fundamentals on the ground of what it takes to run a pressroom.'' He testified that he was familiarizing himself with his duties as a press department manager, ''was trying to grasp the overall operation,'' was not ''close enough to have an opinion at that time'' on crew sizes, and ''just went along with what the operations manager did.'' (Tr. 3381–3385, 3568 1/17/89).

I discredit Bell's testimony that the Company relied on Unger's discretion in deciding whether strikers should be recalled at this time. I find instead that the Company's decision not to recall strikers to work part-time was permitted to apply to this shortage of 22 Employees, without any separate decision being made on whether strikers should be recalled to fill the full-time vacancies.

The shortages had not been confined to the busier months of November and December, when the number of extra-day shifts was even higher, but had extended well into January before Operations Manager Pondel recommended on January 15, 1987, to eliminate a crew on each of the three shifts during that slower season of the year. Evidently because of the number of replacement Employees still being trained (Tr. 2368 12/13/88) and the amount of overtime being required, over a month elapsed before Pondel's plan was accepted and implemented.

I therefore find that the Company has failed to sustain its burden of proof that it had ''legitimate and substantial business reasons'' for failing to offer reinstatement on and after November 4, 1986, to Employees on the preferential hiring list to fill full-time vacancies. A determination of the number of full-time vacancies can be made at the compliance stage of this proceeding, bearing in mind Vice President Bell's credited testimony that the Company does not overstaff (with

full-time Employees) in heavy periods, but must consider employment for the entire year (Tr. 2376 12/13/88).

6. Vacancies during remaining months in 1987

The elimination of the 15 weekly press runs was successful during that slower season of the year in reducing the amount of sixth-shift overtime. Yet, some of the Employees still were repeatedly being assigned sixth-shift overtime (R. Exh. 74).

An example is Employee 89. With the exception of 3 weeks, beginning the week ending March 4 he was assigned an extra-day shift (on one occasion two shifts) each of the 22 weeks ending July 29. Employee 371 worked two extra-day shifts during the week ending February 25 and all except 5 of the 21 weeks he worked between then and the week ending July 29. Although others during this slower season were working sixth-shift overtime less frequently, I find that there continued to be part-time vacancies.

The problem was that when the ''heavy'' season returned around August, there was an insufficient number of pressmen to reinstate the eliminated crews as needed. Many of the pressmen were being frequently assigned one or two extra-day shifts. Between August and December the Company assigned two extra-day shifts a week to Employees a total of 66 times. Employee 89 worked a single extra-day shift every week the last 18 weeks of the year. Employee 371 worked one or two extra-day shifts in 12 of 13 consecutive weeks, including two extra-day shifts in 5 of 6 weeks.

The result was that the Company, unable to reinstate the eliminated press runs when needed without recalling some of the strikers, was required to assign long hours of end-of-shift overtime on the remaining press runs. From August through December it assigned 10 or more hours of end-of-shift overtime a total of 408 times. A total of 155 of these times were assignments of 14 hours or more, the equivalent of about 2 extra days of work during the week. Among these 155, there were 24-assignments above 20 hours a week, extending the end-of-shift overtime as high 28.84, 30.75, and 32 hours and averaging 23.5 hours—well above the equivalent of 3 extra days of work.

When the Company found it necessary to assign sixth-shift overtime to Employees already working 10 or more hours of end-of-shift overtime during the week, the totals were sometimes quite high. An example is when the Company assigned two extra-day shifts (14 hours) on the week ending December 16 to Employee 13, who worked 24.41 end-of-shift overtime hours that week. His total overtime was 38.41 hours which, when added to his 35 regular hours, totaled 73.41 hours—over twice his regular workweek. Similarly, Employee 40 worked 28.84 end-of-shift hours the week ending November 18, yet was assigned 7 hours of sixth-shift overtime, extending his total workweek (35.5 regular hours plus 35.84 overtime hours) to 71.34—also over twice his regular workweek. His average total workweek in the last 9 weeks of the year was 56.9 hours.

The Company from August to December assigned one or two extra-day shifts to Employees already working 10 or more hours of end-of-shift overtime a total of 61 times. The average overtime for these Employees during these weeks was 25.5 hours which, when added to their regular time, totaled over 60 hours.

Both sixth-shift and end-of-shift overtime could have been limited if the Company had been willing to reinstate Employees on the preferential hiring list to fill full-time and part-time vacancies. This would have avoided many instances of its having to schedule its current Employees to work their sixth and seventh shifts, or to double over for second full shifts, in the absence or shortage of crew members. The eliminated press rung could have been restored when needed to avoid much end-of-shift overtime on the remaining press runs.

7. Vacancies in 1988

In 1988 there was a large increase in overtime.

The regular Employees on the job (as shown by the Company's computer printout of the payroll records, R. Exh. 75) were as follows:

> January 1, 1988: *218* Employees (39 below the number of 257 full-time nonsupervisory Employees before the strike).
>
> July 1, 1988: *192* Employees (65 below the prestrike number).
>
> December 31, 1988: *182* Employees (75 lower than prestrike).

The January 1 figure excludes the 14 temporary Employees remaining of the 19 call room Employees hired in December 1987 as ordered by the court, enforcing the Fleischli arbitration award. Six of these temporary Employees were gone by March 16, a seventh by July 6, leaving seven employed December 31.

As found, the overtime in the first 6 months of 1988 was *100 percent* above the overtime in those months in 1985 before the strike (R. Exh. 64).

Because of the continued shortage of Employees, preventing restoring the eliminated press runs when needed, the problem of the high end-of-shift overtime worsened. During 1988 this overtime increased from 31,075.47 hours in 1987 to 42,241.51 hours—an increase of 35.9 percent. This high overtime occurred throughout the year. In 1987 the end-of-shift overtime exceeded 1000 hours only during weeks in the last 4 months of the year. In 1988 it exceeded 1000 hours a week three times in February, March, and April. (R. Exh. 72.)

The amount of sixth-shift overtime also increased in 1988. It went from a total of 9101.84 hours in 1987 to 12,258.32 hours—an increase of 34.6 percent. (R. Exh. 72.)

The payroll records (R. Exh. 75) show many instances of Employees being repeatedly assigned much overtime. An example is the assignment of Employee 344 to sixth-shift overtime every week in the 11-week period beginning January 20. During this period he was assigned 7 hours of sixth-shift overtime 7 times, 14 hours 3 times, and 21 hours 1 time. In addition, he was assigned end-of-shift overtime also every week, as high as 10.5, 12.75, 13.42, 17.75, 19.5 and 24.42 hours. On the weeks ending February 10 and 17, when he was assigned 19.5 and 24.42 hours of end-of-shift overtime and 21 and 14 hours of sixth-shift overtime, this resulted in total weekly overtime of 40.5 and 38.42 hours and total hours of 75.5 and 73.42 hours—over twice his regular workweek. His average weekly overtime was 21.6 hours and the

average total hours was 56.6 in this period. During the year he worked a total of 51 extra-day shifts in 38 weeks.

Some of the many other examples follow. Employee 8 last worked November 11 (R. Exh. 70) after working weekly overtime as high as 26, 26, 28, 34, 34.5, and 36 hours. Beginning in August Employee 13 worked weekly overtime as high as 20.83, 21.75, 23, 23, 24.33, 28, 28.5, 29.75, 30.5, and 35 hours. In September and October Employee 18 worked weekly overtime as high as 26.42, 29.25, 30.42, and 36.42 hours. Employee 20, beginning in July, was assigned weekly overtime as high as 24, 27.67, 30.08, 30.75, 33.5, and 37.83 hours. Employee 40, beginning in August, was assigned to work weekly overtime as high as 22, 25.25, 27.75, 32, 32.25, and 33.5 hours. Through much of the year, Employee 141 was assigned to work weekly overtime as high as 21.25, 23.25, 23.5, 26.5, 27, 29.5, 33, 40, and 44.5 hours. During 4 succeeding weeks in January and February Employee 344 was assigned 24.75, 20.42, 40.5, and 38.42 hours of overtime.

In view of these payroll records and the obvious use of overtime to avoid having to recall Employees on the preferential hiring list, I discredit Unger's denial that he was intentionally attempting to keep from recalling the strikers (Tr. 3466 1/17/89). (Although Unger appeared to be a more trustworthy witness than his predecessor Malone, he impressed me by his demeanor as being less than candid when testifying on certain key points, such as when denying the shortages revealed January 15, 1987, in the confidential memo to him.)

8. Concluding findings on refusal to reinstate

The evidence refutes the Company's defense that there was no need for any of the Employees on the preferential hiring list, as determined by the pressroom managers.

The Company, having failed to reinstate the 74 unfair labor practice strikers replaced after the November 13, 1986 conversion of the strike, employed the following regular Employees:

295 Employees on January 30, 1986 (when the strikers offered to return to work).

234 Employees (23 fewer than the 257 prestrike number) on November 4, 1986 (when the limitation period began).

218 Employees (39 fewer than prestrike) on January 1, 1988.

192 Employees (65 fewer) on July 1, 1988.

182 Employees (75 fewer) on December 31, 1988.

Pressroom Manager Malone, when confronted with the Company's payroll records showing an increase of 44.6 percent in overtime in November 1986 over November 1984 before the strike, gave false testimony that 99 percent of the overtime was end-of-shift overtime (for which strikers would not be recalled). In fact, the Company was assigning a large number of extra-day shifts to its reduced staff at time and one-half instead of recalling strikers to do much of the extra work at regular pay. Also, it was failing to recall strikers ''to put on an extra press'' when needed to avoid some of the end-of-shift overtime.

When Unger replaced Malone as pressroom manager on November 24, 1986, he had no prior experience in a pressroom and had nothing to do with the decision not to recall strikers at that time.

On January 15, 1987, a confidential internal memo revealed a shortage of 22 pressmen. Motivated in part by the desire to avoid looking ''outside the Company for additional Employees'' (a reference to reinstating strikers), the Company decided to eliminate 15 press runs a week during the slower season.

When the ''heavy'' season returned in late summer, there was an insufficient number of Employees to restore these press runs when needed without recalling strikers. The Company failed to recall any strikers and the result was a large increase in end-of-shift overtime on the remaining press runs.

In 1988, when the number of regular Employees dropped to 218 on January 1, 192 on July 1, and 182 on December 31, the amount of end-of-shift overtime (without the 15 eliminated press runs being restored when needed) increased 35.9 percent and the sixth-shift overtime (extra-day shifts) increased 34.6 percent over 1987. The combined overtime for the first 6 months of the year increased *100 percent* over those 6 months before the strike. Yet the Company still failed to recall strikers to fill the many full-time and part-time vacancies. Vice President Bell admitted that the Company made no studies to determine if it was cost effective to work the increased overtime (Tr. 2405 12/13/88, 3152 1/16/89).

In its brief the Company appears to deny the large increases in overtime during the relevant periods (as shown by its own exhibits). After emphasizing the increase in productivity and efficiency (without the restrictions in the previous collective-bargaining agreement), it concludes (at 80) that it has ''experienced a substantial drop in the number of regular hours worked in the pressroom while at the same time *noticing little if any increase in overtime*'' (emphasis added).

After weighing all the evidence I find that the Company did leave to the pressroom managers' discretion (except during the first 3 months after Unger's appointment) the decision when to recall strikers, but with the clear understanding that the recalls would be delayed as long as feasible.

I also find that the Company's motivation is clear. After having weathered the strike and having gone to great expense in replacing most of the staff, it preferred to keep the pressroom nonunion, without the Union's returning to the plant and seeking the restoration of higher wages and its prior working conditions. One way to do this was to leave the strikers indefinitely on the preferential hiring list, outside the plant.

Under these circumstances I find that the Company has failed to sustain its burden of proof that its failure to recall its Employees on the preferential hiring list was for ''legitimate and substantial business reasons,'' as required by *Laidlaw Corp.*, above, 171 NLRB at 1370.

I therefore find that since November 4, 1986, the Company has violated Section 8(a)(3) and (1) by failing to offer reinstatement to its Employees on the preferential hiring list to fill the full-time and part-time vacancies as they occur.

F. *Refusal to Furnish Information*

1. Names and addresses of replacements

The Union had the dual responsibility of representing both the permanently replaced strikers and the Employees in the

plant, whose support it must have to retain its status as the bargaining representative.

It requested the Company to furnish the names on January 30, and the names and addresses on April 7, 1986, of all strike replacements (G.C. Exhs. 111 & 132). It further requested on June 9, 1986, the names and addresses and reason for termination of discharged bargaining unit Employees ''to enable the union to consult with and advise the Employee . . . and to meet with management when the circumstances warrant it for the purpose of requesting reconsideration'' (G.C. Exh. 138). (It later filed charges on behalf of two discharged replacements, Tr. 881 12/2/87, 4047 1/19/89.)

The Company, claiming its concern over ''the amount of violence connected with this strike,'' refused to furnish the names and addresses. It never sought a promise that the Union would keep the list of names and address confidential (Tr. 3984 1/19/89) and never requested any assurances from the Union that the strike replacements would not be harassed. It offered, instead, an alternative that would keep the Employees largely isolated from the Union. It offered to have an accounting firm forward any union correspondence to the replacements. (G.C. Exhs. 116, 136, 140, 145.)

The Union pointed out on February 26 that ''There has been no allegation that any violence has been directed by [the Union] to any of the replaces'' (G.C. Exh. 120). It explained on April 7 that ''We as the collective bargaining representative have an obligation to represent all Employees in our bargaining unit'' and ''We do not have access to the plant or to bulletin boards and . . . have no way of communicating with these Employees except by mail.'' It added that it strongly disagreed with the Company's statement about the violence and stated that the strike ''has been a peaceful one.'' (G.C. Exh. 32.)

The Union considered the accounting-firm alternative an insult (Tr. 2434 1/20/88).

Before Vice President Bell revealed at the trial that he himself made the decision not to furnish the names and addresses (Tr. 2332–2333 12/13/88), the Company had introduced into evidence hundreds of pages of testimony and exhibits in is defense on this issue. In all this evidence the Company had failed to show that the Union or any of its members or supporters had taken any action against any of the permanent replacements.

There was no evidence that anybody identified as a permanent replacement had been blocked, threatened, harassed, or molested at the Chicago Avenue entrance where the Union was picketing. (After about the first month of the strike, Tr. 1484 12/9/87, the Mailers union—one of the other unions on strike—had been picketing at the Grand Avenue entrance, which the incident reports, R. Exh. 52, show was the entrance used by most of the pressmen.) In over 6 months of the strike, there was no incident of the Union taking down the license plate number or following any of the permanent replacements to their homes. Nails had been found in the Chicago Avenue driveway, but nobody identified as a permanent replacement was reported to have been affected.

In the absence of evidence of any action being taken against any permanent replacement, the Company built its defense on incidents concerning other Employees, pressroom and mailroom supervisors, and nonEmployees; vehicle damage done at parking lots; incidents at the Tribune Tower and other locations where the pressmen did not work; damage to newspaper vending boxes, etc. In a large majority of the reported incidents, there is no indication that the Union was involved in any way.

Vice President Bell testified ''there were a lot of reasons'' for his decision not to release the names and addresses. He mentioned (1) ''a lot of violence and strike related activity,'' (2) ''a new work force,'' many of whom were ''young, single people, minorities,'' (3) the ''pressroom management felt strongly that the Employees did not want their names and addresses released'' (relying on Pressroom Manager Malone's grossly exaggerated testimony), and (4) the Company's upheld decision not to release the names and addresses to another union on strike. Most significantly Bell then added:

> I felt that we were on reasonable grounds not to release those names and addresses. I didn't think it served any positive purpose. It didn't mean *anything positive to us* so that was my input. [Emphasis added.]

I find controlling the holding of the court in *NLRB v. Burkart Foam*, 848 F.2d 825, 834–835 (7th Cir. 1988), enfg. 283 NLRB 351 (1987):

> Even if we were to find that [the employer] did have a reasonable good faith fear of Union retaliation against its Employees, [the employer] would also have to show that the Union was asked for and refused to provide assurances that the Employees would not be harassed. . . .
>
> . . . .
>
> Thus, we find that even if [the employer] had a justifiable fear that the Union would harass Employees who had crossed the picket line, substantial evidence supports the Board's finding that [the employer] has not satisfied the other requirements of a clear and present danger defense. [The employer] *did not seek assurances from the Union or suggest alternatives that would be acceptable to both parties*. [Emphasis added.]

The strike had lasted over 6 months, and there was no report of anybody identified as a permanent replacement being harassed by the Union in any way. I find that the Company had no real fear that the release of the names and addresses would cause a clear and present danger of harassment or other harm to the replacements. But even if the Company did have ''a justifiable fear that the Union would harass'' the replacements, it was required to ''seek assurance from the Union or suggest alternatives that would be acceptable to both parties.'' It did not seek any assurances and the only alternative suggested was, of course, wholly unacceptable to the Union.

I agree with the Union's contention in its brief (at 53–54) that the Company's accounting-firm offer would demean the Union in the eyes of the Employees. ''Receiving the Union's communication by this indirect method would only make the recipient believe that the Company was right and the Union could not be trusted with the names and addresses.'' It would impede soliciting of both nonstrikers and strike replacements to become union members (Tr. 2435 1/20/88). It would merely serve the Company's purpose in isolating the press department from the Union, as the Company demonstrated was its purpose by failing over a 3-year period to reinstate even a single Employee on the preferential hiring list.

I therefore find, as alleged in Case 13–CA–25921, that the Company violated Section 8(a)(5) and (1) by refusing on and after February 6, 1986, to furnish the Union the names and on and after April 7, 1986, the names and addresses of the replacement Employees.

I further find, as alleged in Case 13–CA–26131, that on and since June 26, 1986, the Company has also violated Section 8(a)(5) and (1) by refusing to furnish the Union a weekly list of bargaining unit Employees who have been terminated, including names, addresses, and reasons for termination.

2. Number of supervisors

The complaint in Case 13–CA–25921 alleges that since May 1, 1986, the Company has refused to furnish the Union the number of supervisors who will be performing bargaining unit work.

I consider this a frivolous allegation. Both before and after that date the Company furnished this information to the Union, although not in the form sought.

I shall therefore dismiss this allegation.

G. *Nonnegotiated Wage Rates for Nonstrikers*

1. Contentions of the parties

After the strike, the Company began isolating the nonstrikers and returning strikers from their bargaining representative. Although bargaining with the Union over terms of an agreement, the Company abrogated to itself the determination of wages for the Employees (other than journeymen) who remained on the job and those who later crossed the picket line as returning strikers.

The Company's theory is that the nonstrikers and returning strikers were performing former work of strikers and became strike replacements, that it had the right to establish unilaterally the wages of strike replacements, and that therefore it had this right for nonstrikers and returning strikers.

The Company's also contends that (1) it established a classification of ''pressroom Employee'' for all permanent strike replacements, with a base wage rate of about 60 percent of the journeyman rate, (2) nonstrikers and returning strikers worked alongside the replacements and were upgraded to that rate if they were making legs (Tr. 1875–1876 12/7/88), (3) juniors ''performed substantially different work after the strike,'' manning the presses, and these ''new jobs would have been jeopardized if and when the striking Union members resumed work in the pressroom,'' (4) nonstrikers and returning strikers resigned their union membership, and their ''interests were more closely aligned'' with replacements than with the strikers,'' and (5) nonstrikers and returning strikers ''were properly classified as strike replacements.''

The General Counsel contends that ''It is of no consequence that [the Company] attempted to justify the wage increases by calling those who stayed in and those who crossed-over as replacements, [the Company] was not free to change their wage rates without bargaining with the Union [citing *W. W. Wallwork Fargo*, 123 NLRB 91, 105–107 (1959)].'' He adds that the Company's documents (G.C. Exhs. 195B and 197) prove the violations.

2. Analysis

There is, of course, a fundamental difference between setting wages for outside strike replacements and bargaining before changing wages of persons who are already Employees and members of the bargaining unit. Calling nonstrikers and returning strikers ''strike replacements'' does not erase that difference.

The Company had a well-established right to set wages for new hired Employees as strike replacements. It has, however, indicated no necessity to act without bargaining to establish a new wage scale or a new classification (pressroom Employee) for any of its nonstriking juniors. (It was not hiring them; it was promoting them.) Obviously it had no right or legitimate reason to set unilaterally a higher wage scale to induce striking juniors to abandon the strike and cross the picket line to become returning strikers.

Although the nonstrikers and returning strikers resigned from the Union, there is no evidence that they did so for any reason other than economic: wanting to retain their livelihood. It was the Company—not these Employees—that was purporting to decide that their new jobs would be in jeopardy and that their interests were closer aligned to the replacements than the strikers. In doing so, it was isolating them from the Union, acting as if the operations behind the picket line were nonunion.

This unilateral action not only deprived the Union of its right as the recognized bargaining representative to negotiate on terms of employment for these Employees during and after the strike, but it tended to impede bargaining for a settlement of the strike. The Company was keeping the Union in the dark on conditions inside the plant, depriving it of knowledge necessary to evaluate the progress of the strike and to reappraise its bargaining stance as the strike drug on month after month.

Finally on October 3, 1985 (2-1/2 months after the strike began) the Union made a formal request for ''the present wages being paid Employees in our bargaining unit'' (G.C. Exh. 95). The Company's response (G.C. Exh. 98), listing each wage rate without showing any classifications, was made on October 11, 1985. It was at the next bargaining meeting that the Company foreclosed any settlement of the strike by making the unlawful impasse demand to change the scope of the bargaining unit.

3. Concluding findings on nonnegotiated wages

In *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 247–248 (7th Cir. 1982) (involving reinstatement of unfair labor practice strikers, not economic strikers as the present strikers were until the November 13, 1985 conversion), the Seventh Circuit ruled that interests of returning strikers may be more closely aligned to strikers than strike replacements. It held:

> We believe that in this case the interests of the three returning strikers are more closely aligned to those of the strikers. Returning strikers are and remain members of the bargaining unit even though they find themselves on the opposite side of the picket line from the strikers. Their interests of course differ to some degree by this fact alone, but the difference is not sufficient to permit unilateral action by the employer. We are not prepared to assume as Capitol [the employer] would have us do

> that the reason for returning to work was because of a conflict with the interests of the strikers. Capitol had a duty to bargain with the Union before changing any of the benefits being received by the three returning strikers. By failing to do so, Capitol bypassed the still legitimate and exclusive bargaining agent of the three Employees. To permit such conduct would result in a serious undermining of the Union's authority and leave the impression with all Employees that the Union is powerless.

I find that much of this reasoning is applicable to this case, despite the Company's speculation that the juniors' new jobs (operating the presses) would be in jeopardy on return of the strikers. Because of the unlikelihood that the Union would make that demand and the greater unlikelihood that the Company would accede if the Union did, I find that this does not distinguish the *Capitol-Husting* decision and was raised merely as an afterthought.

I reject the Company's untenable contention that the Union has waived the right to bargain on the higher wages (and presumably on the higher paid classification of pressroom Employee) for nonstrikers and returning strikers because the contractual wage rates are only minimum rates (Tr. 2123 1/18/88).

I find, as alleged in Case 13–CA–25802, that since October 27, 1985 (the beginning of the limitation period) the Company ''without prior notice to the Union and without having afforded'' it the opportunity to bargain, paid nonstrikers and returning strikers nonnegotiated wage rates, violating Section 8(a)(5) and (1).

H. *Discharge of Strikers*

1. Ralph Fiore

Picket Captain Fiore was involved in the only incident during the strike in which a picket followed an Employee from the Union's picket line.

This incident occurred about 1:45 p.m. on August 11, 1985, at the Chicago Avenue entrance. As Fiore credibly testified, a woman Employee (Circulation department clerk Danie Helwink) rode her bicycle across the picket line, calling the pickets ''jack offs, motherfuckers, assholes'' and ''she gave us the finger.'' Fiore told two other pickets: ''I will see if I can talk to her and have her stop using profanity on this line.'' (I discredit Helwink's claim that she did nothing to provoke the incident, Tr. 538 10/20/88.) Fiore proceeded to follow Helwink in his half-ton truck, overtaking her about two blocks away. (Tr. 1546–1547 12/9/87.)

Although the evidence is in dispute what happened, I find that after speaking to her briefly, he accidentally struck the front tire of Helwink's bicycle with the front bumper of his truck as he was driving away, causing her to fall to the street, scraping her hand and arm. There was no damage to the bicycle. (Tr. 1547–1548 12/9/87, 539–542 10/20/88.)

On November 4, 1985, the Company discharged Fiore because he ''deliberately ran her off the street with this] truck, by hitting the front wheel of her bicycle, causing her fall and injury. Your actions and conduct in this incident, which intentionally caused injury and endangered the life of this Employee, cannot be tolerated.'' (G.C. Exh. 169.)

Despite the provocation and the slight injury, I agree with the Company that Fiore engaged in misconduct that, under the circumstances existing, tended ''to coerce . . . Employees in the exercise of rights protected under the Act.'' *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9d Cir. 1985), cert. denied 474 U.S. 1105 (1986). Fiore followed an Employee riding a bicycle from the picket line in his truck. I find that this alone would have tended to be coercive, even without the accidental collision between the truck and the bicycle, causing the Employee to fall. It cannot be considered acceptable strike conduct for a picket.

I therefore shall dismiss the allegation in Case 13–CA–25906 that the Company unlawfully discharged Fiore.

2. William Carrington

On December 13, 1985, the Company discharged picket William Carrington for subjecting female Employees to racial and sexual harassment on a number of occasions, particularly on October 2, 1985, when the harassment ''was extremely abusive, obscene, and perverted'' (G.C. Exh. 170).

The credited testimony of Customer Service division Employee Shirley Foster and Circulation department Employee Debra Banks clearly show that Carrington went beyond the pale in this racial and sexual harassment of these clerical Employees as they they were leaving work.

About 3 p.m. on October 2, 1985, as Foster joined Banks and Employee Valerie Mohammed at the bus shelter behind the picket line, Carrington ''was imitating gas sounds. Then waving the fumes away with his hands saying . . . 'That is why they smell because they eat those bean pies.''' Carrington next directed a comment toward Foster: ''Look at the come dripping down her legs.'' After she called him a motherfucker, he ''said my mother was a motherfucker and he had fucked her last night.'' She turned to hit him with her purse (her mother having died in February), but Banks restrained her. (Tr. 777–779, 798–799 10/21/88.)

On previous occasions, as Foster credibly recalled, Carrington made racial slurs about the women's skin color and stated ''he wished he could come back into the Freedom Center to get the blow jobs that we were giving out free up in there.'' His ''favorite line was 'he come dripping down our legs.''' He called the women black baboons, referred to ''bones being driven through the noses,'' and used the term ''nigger bitch.'' (Tr. 785–789 10/21/88.) He was obviously disobeying his instructions not to make any racial slurs on the picket line (Tr. 1483 12/9/87). Banks credibly recalled that Carrington once shouted into her fiance's car, ''You should have her up there on Halsted [as a prostitute]. You could make a lot of money.'' (Tr. 801 10/21/89.)

Carrington's conduct was clearly ''outside the protection of the Act,'' as the Company argues in its brief (at 174). I shall dismiss the allegation in Case 13–CA–25906 that the Company unlawfully discharged Carrington.

3. Arthur Vehlow

On December 13, 1985, the Company discharged picket Arthur Vehlow also for the same offense on October 2, 1985: subjecting ''female Employees to abusive, obscene, and perverted racial and sexual harassment'' (G.C. Exh. 171). The Company was obviously in error in discharging him.

The Company's witnesses revealed that it was Carrington, not Vehlow, who engaged in the misconduct. Moreover, on October 2 Vehlow was not even present on the picket line at the time (3 p.m.). I credit Vehlow's denials and his testimony that he came in October 2, 1985, at 6 p.m. for the 6–10 picket shift (Tr. 1509–1510, 1518 12/9/87). The picket sign-in sheet (G.C. Exh. 182) confirms that he signed for picket duty on that evening shift.

The General Counsel having proved that Vehlow did not engage in the alleged misconduct arising out of the picketing, a protected activity, I find that the Company unlawfully discharged Vehlow in violation of Section 8(a)(1). *Teledyne Still-Man*, 295 NLRB 161 fn. 3 (1989), citing *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

CONCLUSIONS OF LAW

1. By bargaining to impasse November 13, 1985, on its demand, as a condition for reaching an agreement, that the zipper clause be applied to change the scope of the bargaining unit, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The following Employees constitute a unit appropriate for bargaining:

> All the Employees engaged in the operation of the presses in the pressrooms of the Employer and such rewinding machines of the Employer as are used for printing. The press department shall be interpreted to mean the entire pressroom and not any portion of this department, and shall be understood to mean such as is made up of union Employees and in which the Union has been formally recognized by the Employer, including all work currently recognized between the parties as embracing the operation of all printing presses in the respective pressrooms of the Employer and shall be interpreted to include:
>
> 1. Changing and adjusting folder pins, changing folder cutting rubbers, and changing and adjusting folder cutting knives. (Does not include repairing or adjusting of folder cutting knives after they have been taken out of the press.)
>
> 2. Changing oil in press oil reservoirs, changing oil filters and greasing press cylinders and other parts.
>
> 3. Changing and adjusting Angle Bars. Changing and adjusting regular or standard size slitters. Changing and adjusting trolleys. Changing of position, compensating, and truing of pipe rollers.
>
> 4. Changing folders from straight to collect and vice versa and folder changeovers as may be needed for change in size on all black presses.
>
> 5. Setting and adjusting rubber printing rollers on press inking mechanisms and auxiliary color fountains.
>
> 6. Throwing in and out fudges, units and color units and the reversal of cylinders necessary in connection with color printing including hanging and removing portable color fountains. (Includes horizontal clutches.)
>
> 7. plate-making and processing of plates as described in the Memorandum of Understanding Regarding Laser plate-making and Employment of Former Stereotypers as Pressroom Employees, entered into June 18, 1981, as amended.
>
> It is understood and agreed that any or all of the above work (Items 1 to 7 inclusive) may be performed by machinists as part of a repair or overhaul.

3. The economic strike was converted November 13, 1985, to an unfair labor practice strike.

4. By refusing January 30, 1986, to reinstate 74 unfair labor practice strikers, the Company violated Section 8(a)(3) and (1) and further prolonged the strike.

5. By failing since November 4, 1986, to offer reinstatement to its Employees on the preferential hiring list to fill full-time and part-time vacancies as they occurred, the Company has violated Section 8(a)(3) and (1).

6. By refusing since February 6, 1986, to furnish the Union the names and by refusing since April 7, 1986, to furnish the Union the names and addresses of the strike replacements, the Company has violated Section 8(a)(5) and (1).

7. By refusing since June 26, 1986, to furnish the Union a weekly list of terminated bargaining unit Employees, including names, addresses, and reasons for termination, the Company has further violated Section 8(a)(5) and (1).

8. By implementing changes in working conditions on November 1, 1986, when a good-faith impasse did not exist, the Company violated Section 8(a)(5) and (1).

9. The Company has not unlawfully refused since May 1, 1986, to furnish the Union the number of supervisors who would perform bargaining unit work.

10. By paying nonstrikers and returning strikers nonnegotiated wage rates since October 27, 1985, the Company has violated Section 8(a)(5) and (1).

11. By discharging Arthur Vehlow December 13, 1985, on the mistaken belief that he engaged in alleged misconduct arising out of the picketing, a protected activity, the Company violated Section 8(a)(1).

12. The Company did not discharge William Carrington and Ralph Fiore unlawfully.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully refused January 30, 1986, to reinstate 74 unfair labor practice strikers (to be identified in a nondiscriminatory manner), it must offer them immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from that date to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest accrued before January 1, 1987, shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

The Respondent having unlawfully failed since November 4, 1986, to offer reinstatement to Employees on the preferential hiring list to fill full-time and part-time vacancies as they occurred, it must offer them immediate and full reinstatement to their former positions to fill these vacancies, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings and

other benefits, computed on a quarterly basis from date of failure to date of proper offer of reinstatement, as required above. Declined offers for part-time employment shall be made to others on the list without affecting the declining Employees' positions on the list for offers of full-time employment.

The Respondent having unlawfully discharged Employee Arthur Vehlow, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, as required above. *Abilities & Goodwill*, 241 NLRB 27 (1979).

Because of the Respondent's unlawful isolation of the bargaining unit Employees from the Union for years to undermine the Union's authority as the legitimate and exclusive bargaining representation and to ''leave the impression with all Employees that the Union is powerless,'' *Capitol-Husting Co. v. NLRB*, above, 671 F.2d 237, 248 (7th Cir. 1982), I find that it must give the Union an opportunity to meet at reasonable times with the Employees at the Freedom Center in nonwork areas during nonworking time.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Demanding, as a condition for signing an agreement, that the zipper clause be applied to change the scope of the bargaining unit.

(b) Failing to offer reinstatement to Employees on the preferential hiring list to fill full-time and part-time vacancies as they occur.

(c) In any like or related manner interfering with, restraining, or coercing Employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer 74 unfair labor strikers immediate and full reinstatement to their former positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of its January 30, 1986 refusal to reinstate them, in the manner set forth in the remedy section of this decision.

(b) Offer immediate and full reinstatement to Employees on the preferential hiring list to their former positions to fill full-time and part-time vacancies that have occurred since November 4, 1986, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of its failure to reinstate them when the vacancies occurred, in the manner set forth in the remedy section of this decision.

(c) Offer Arthur Vehlow immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of this decision.

(d) Remove from its files any reference to the unlawful discharge and notify the him in writing that this has been done and that the discharge will not be used against him in any way.

(e) On request, bargain with Chicago Web Printing Pressmen's Union No. 7, Graphic Communications International Union, AFL–CIO as the exclusive representative of the Employees in the bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) Furnish the Union the names and addresses of the strike replacements.

(g) Furnish the Union a weekly list of terminated bargaining unit Employees, including names, addresses, and reasons for termination.

(h) On request of the Union, rescind the Posted Conditions of Employment and the changes in working conditions implemented November 1, 1986.

(i) On request of the Union, bargain with it on wages for the Employees who did not strike and those who returned after striking.

(j) Notify the Union that it may meet at reasonable times with bargaining unit Employees at the Freedom Center in nonwork areas during nonworking time.

(k) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(l) Post at its Freedom Center facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(m) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT demand that the zipper clause be applied to change the scope of the bargaining unit.

WE WILL NOT fail to offer to reinstate Employees to fill full-time and part-time vacancies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer 74 unfair labor strikers immediate and full reinstatement to their former positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our January 30, 1986 refusal to reinstate them, less any net interim earnings, plus interest.

WE WILL offer immediate and full reinstatement to Employees on the preferential hiring list to their former positions to fill full-time and part-time vacancies that have occurred since November 4, 1986, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from our failure to reinstate them when the vacancies occurred, less any net interim earnings, plus interest.

WE WILL offer Arthur Vehlow immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL, on request, bargain with Chicago Web Printing Pressmen's Union No. 7, Graphic Communications International Union, AFL–CIO and put in writing and sign any agreement reached on terms and conditions of employment for our Employees in the bargaining unit.

WE WILL furnish the Union the names and addresses of the strike replacements.

WE WILL furnish the Union a weekly list of terminated Employees, including names, addresses, and reasons for termination.

WE WILL, on request, rescind the Posted Conditions of Employment and the November 1, 1986 changes in working conditions.

WE WILL, on request, bargain with the Union on wages for the Employees who did not strike and those who returned after striking.

WE WILL notify the Union that it may meet at reasonable times with Employees at the Freedom Center in nonwork areas during nonworking time.

CHICAGO TRIBUNE COMPANY